VOLUME XXXVIII NUMBER 3

Massachusetts Law Quarterly

AUGUST 1953

The Legal History of Massachusetts from 1630 to 1953

A Story told largely in Pictures

for

THE DIAMOND JUBILEE

of

THE AMERICAN BAR ASSOCIATION

(1878 - 1953)

MEETING IN BOSTON, MASSACHUSETTS

August 23-28, 1953

Issued by the Massachusetts Bar Association
15 Pemberton Square Boston 8, Mass.

The Service Set since 1882

United States Supreme Court Reports, Annotated LAWYERS' EDITION

Skilled, high quality editing, low cost, and a great saving in shelf space makes this famed Service Set the brilliant leader of its field.

Impartial, Exhaustive Annotations

Through these brilliant annotations you can get all the law on a given point quickly. You'll find them to be super-briefs.

Annotation References

You are led to all the annotations in the Annotated Reports System. Once you find your annotation, your research is complete.

Summary of Decision

From volume 92 on, this Summary precedes every case with a written opinion. It tersely sets forth: facts; question; court's decision; essence of opinions.

Epitomized Briefs

These invaluable Briefs of Counsel give you the pertinent arguments of *both* sides.

Inquiries welcomed. Write to the Publisher:

THE LAWYERS CO-OPERATIVE PUBLISHING CO.
ROCHESTER 14, NEW YORK

DEDICATION

The American Bar Association, organized at Saratoga in 1878 under the leadership of Hon. Simeon E. Baldwin of Connecticut with three hundred members, was reorganized in its present form at the meeting in Boston in 1936. It is a privilege again to welcome to Massachusetts the Association, now numbering about fifty thousand members, on its 75th Anniversary.

No one man thought up American government—neither Franklin nor Washington, George Mason, John Adams, Thomas Jefferson, James Madison, Alexander Hamilton or anyone else, but they all contributed with their separate talents. Many individual leaders go to make up the history of a nation and as "one star differeth from another star in glory," so the great Virginians, and the men of other colonies and later States, combined with the men of Massachusetts to produce American history. This meeting is dedicated to "liberty under law" and as a part of it we present a composite picture which, so far as *legal* history goes, may illumine, and put life into, Daniel Webster's much quoted words, "Massachusetts—there she stands".

In the hope that it may interest and entertain you, this outline of the legal history of Massachusetts since 1630 as a story told largely in pictures is presented on behalf of the organized bar of Massachusetts.

F. W. G.

For complete table of contents see page 3.

SAMUEL P. SEARS
President, Massachusetts Bar Association

Former Presidents

Richard Olney, Boston 1909-1910
Alfred Hemenway, Boston 1910-1911
Charles W. Clifford, N. Bedford .1911-1912
John C. Hammond, Northampton 1912-1913
Moorfield Storey, Boston 1913-1914
Herbert Parker, Lancaster 1914-1915
Henry N. Sheldon, Boston 1915-1916
Charles E. Hibbard, Pittsfield ..1916-1917
Arthur Lord, Plymouth 1917-1918
John W. Cummings, Fall River.1918-1919
Frederick P. Fish, Brookline ...1919-1920
Edward W. Hutchins, Boston ..1920-1921
Addison L. Green, Holyoke 1921-1922
Thomas Hovey Gage, Worcester.1922-1923
Thomas W. Proctor, Newton ..1923-1924
George L. Mayberry, Waltham .1924-1925
Franklin G. Fessenden, Greenfield 1925-1926
Ernest H. Vaughan, Worcester .1926-1927
George R. Nutter, Boston 1927-1928
Frederick W. Mansfield, Boston.1928-1931
Frederick N. Wier, Lowell 1931-1932
Nathan P. Avery, Holyoke 1932-1935
Henry R. Mayo, Lynn 1936-1938
Joseph Wiggin, Malden 1939-1941
Mayo A. Shattuck, Hingham ...1941-1944
Edward O. Proctor, Newton ..1944-1947
Louis S. Cox, Lawrence 1947-1948
Richard Wait, Harvard 1948-1950
Samuel P. Sears, Newton 1950-1953

President-Elect

ROBERT W. BODFISH, Longmeadow

SECRETARIES

Robert Homans, Boston, 1909-1912
James A. Lowell, Newton, 1913-1915
Frank W. Grinnell, Boston, 1915-

ASSISTANT SECRETARIES

Lowell S. Nicholson, Salem, 1946-1948
William B. Sleigh, Jr., Marblehead, 1948-

TREASURERS

Charles E. Ware, Fitchburg, 1909-1914
Charles H. Beckwith, Springfield, 1915-1919
Charles B. Rugg, Worcester, 1919-1924
John W. Mason, Northampton, 1924-1932
Horace E. Allen, Springfield, 1932-1947
Paris Fletcher, Worcester, 1947-1953

Treasurer-Elect—EDMUND MARSHALL MURRAY, Wellesley

Massachusetts Law Quarterly

Volume XXXVIII **AUGUST, 1953** **Number 3**

TABLE OF CONTENTS

The Legal History of Massachusetts 1620-1953 being, with some additions, a collection of Pictures and Reprints from the Massachusetts Law Quarterly and from The "Bar Bulletin" of the Boston Bar Association

Foreword

"TWISTORY," MYSTERY AND HISTORY

In 1948 an article appeared in the press on "Twistory in the Making" beginning as follows:

"Do not look up the word 'twistory' in your dictionary. You would not find it even in a 1948 edition. Nor would you find the cognates 'twistorian' and 'twistoric'. All three are brand new words coined to fit a trend that has been developing over the past 30 years—the trend to twist history in accordance with government-sponsored ideologies. That does not mean that there were no twistoric manifestations prior to 1918."

Except for the rather intriguing word "twistory" there is nothing new about these remarks. They are directed primarily to the current Russian method of reporting or teaching which appear to follow the Hitler pattern, but the practice, in varying forms and degrees, has been common for centuries.

Writing to Jefferson in November 1815, John Adams said, "arbitrary power, wherever it has resided, has never failed to destroy all the records, memorials, and histories of former times, which it did not like, and to corrupt and interpolate such as it was cunning enough to preserve or to tolerate. We cannot, therefore, say with much confidence what knowledge or what virtues may have prevailed in some former ages in some quarters of the world."

"Twistorical" examples may even be found in books about law and courts.

LAWYERS AS HISTORIANS

Under the title "The Law and You" Prof. Max Radin, in a little "Pelican Mentor" book, reminds us that:

> "Lawyers are . . . necessarily historians, although they resent being so called and profess at most a lukewarm interest even in the development of their own institutions. They call concern in such matters 'antiquarian', something that is entertaining but slightly trivial. Yet they stress the fact that they derive their law from precedent, which is pure history, and they seek to interpret statutes by considering the conditions under which the statute arose and was framed, which is also pure history.
>
> "The fact that lawyers resent being historians does not prevent them from being so, and it would be better if they took their obligations as historians seriously and considered carefully their legal ideas in the historical setting in which they were developed, and if they examined the historical conditions which gave them their present form. If they do not take this task seriously, they

will not cease to be historians. They merely will be bad historians."

and in the words of Lord Acton,

"The ignorance of history in an uncritical age is the most insidious channel by which error penetrates".

HISTORY AS A LITERARY ART

"When John Citizen feels the urge to read history, he goes to the novels of Kenneth Roberts or Margaret Mitchell, not to the histories of Professor this or Doctor that. Why?

"Because American historians, in their eagerness to present facts and their laudable anxiety to tell the truth, have neglected the literary aspects of their craft. They have forgotten that there is an art of writing history.

"Even the earliest colonial historians like William Bradford and Robert Beverly knew that; they put conscious art into their narratives. And the historians of our classical period, Prescott and Motley, Irving and Bancroft, Parkman and Fiske, were great literary craftsmen. . . .

"The American public has become so sated by dull history textbooks in school and college that it won't read history unless disguised as something else. . . . Or, more often, they get what history they want from historical novels."

From "History as a Literary Art—An Appeal to Young Historians." Old South Leaflet Series II No. 1, by Prof. Morison.

THINKING IN THE LIGHT OF HISTORY

The history of freedom—which means, of course, freedom of individuals—consists largely of the history of the thought of many individuals to which other individuals respond in endless succession. One of our historical thinkers, the late Prof. Andrew C. McLaughlin of Chicago said,

". . . the hope for successful popular government—and in very fact its justification—is based upon the willingness of people to think."*

Turning to the continuity of history which our pictures reflect and quoting again from Prof. McLaughlin,

"You cannot in discussion of American History lose sight of the seventeenth century." He emphasized the fact

"That the work of the American Revolutionist was not so much to create something brand new, as to take up the old, and to make old visions real, give dreams a body, transmute hopes into tangible institutions." And again,

* "Foundations of American Constitutionalism".

"One thing appears to be certain: individual liberty, law, limited government, federalism, local and personal responsibility and power—all these cannot continue unless supported by intelligence and by some portion of that earnestness and consecration which established our constitutional principles and enabled America to survive."

Applying these words, the outstanding characteristics of the men portrayed here, whatever their faults, were "earnestness and consecration" in their thinking and action for our benefit as well as their own.

MASSACHUSETTS

"Let no New-Englander forget that the Old Dominion antedates Massachusetts Bay, and that representative government was established on the banks of the James the year before the Mayflower Compact was signed. But it was a long uphill work inducing Englishmen" to colonize. "There were times when only a handful of brave men at Jamestown, and a few confident investors in England stood between Virginia and extinction."

Thus writes Prof. Samuel E. Morison in the opening Chapter of his "Builders of the Bay Colony". He then tells us that Captain John Smith on one of his voyages in 1615 was captured by a French pirate and while at sea, wrote "A Description of New England" in which he referred to "the Countre of Massachusets, which is the paradise of all these parts" . . . "This was the first appearance in print, or in recorded literature, of the name of our Commonwealth. Although the name Massachusetts has passed through a variety of forms and spellings, John Smith's version, with an additional t, became the official one. The word means 'at the Great Hill'—the Great Blue Hill of Milton."

THE BAY COLONY

Morison continues, "The Founding of the Bay Colony—was less a colonial enterprise, than a great puritan emigration—organized by men of substance and standing, supported by a—prosperous body of the English nation and consciously directed toward the—end of founding—a great puritan state. It was in Massachusetts Bay, not Plymouth, that there were worked out those characteristic forms of state, church and school, which have set off New England as a province apart.

"It is not easy to describe these people truthfully, yet with meaning to moderns. For the men of learning and women of gentle nurture who led a few thousand plain folk to plant a new England on ungrateful soil were moved by purposes utterly foreign to the present America. Their object was not to establish prosperity or prohibition, liberty or democracy, or indeed anything of currently recognized value. Their ideals were comprehended vaguely in the

term puritanism, which nowadays has acquired various secondary and degenerate meanings. These ideals, real and imaginary, of early Massachusetts, were attacked by historians of Massachusetts long before 'debunking' became an accepted biographical mode; for it is always easier to condemn an alien way of life than to understand it. My attitude toward seventeenth-century puritanism has passed through scorn and boredom to a warm interest and respect. The ways of the puritans are not my ways, and their faith is not my faith; nevertheless they appear to me a courageous, humane, brave, and significant people."

In his "Maritime History of Massachusetts" he says:

"Massachusetts has a history of many moods, every one of which may be traced in the national character of America. By chance, rather than design, this short strip of uninviting coast-line became the seat of a great experiment in colonization, self-government, and religion. For a generation, Massachusetts shared with her elder sister, Virginia, leadership in the American Revolution. For another generation, with her off-spring Connecticut, she opposed a static social system to the ferment of revolutionary France. With the world peace of 1815 she quickened into new life, harnessed her waterfalls to machine industry, bred statesmen, seers, and poets, generated radical and revolutionary thought. The Civil War rubbed smooth her rough corners, sapped her vitality to preserve the Union and build the Great West, and drew into the vacuum new faiths and peoples."

And he then describes

"THE YANKEE RACE"

"The race was not Anglo-Saxon, or Irish. . . . It was Yankee, a new Nordic amalgam on an English Puritan base; already in 1750 as different in its character and its dialect from the English as the Australians are today. A tough but nervous, tenacious but restless race; materially ambitious, yet prone to introspection, and subject to waves of religious emotion. Conservative in its ideas of property and religion, yet (in the eighteenth century) radical in business and government. A people with few social graces, yet capable of deep friendships and abiding loyalties; law-abiding yet individualistic, and impatient of restraint by government or regulation in business; ever attempting to repress certain traits of human nature, but finding an outlet in broad, crude humor and deep-sea voyages. A race whose typical member is eternally torn between a passion for righteousness and a desire to get on in the world. Religion and climate, soil and sea, here brewed of mixed stock a new people."

THE PLYMOUTH COLONY

In his address in Concord, New Hampshire, in 1937 on "The Pilgrim Fathers,—Their Significance in History", he said—

"You may well ask, why does the Colony of New Plymouth bulk so large in the historical consciousness of today? Why do most Americans and most Englishmen (to the intense annoyance of Virginians, whose Jamestown colony was founded thirteen years earlier) so consistently err in claiming priority for the Mayflower? Why do the Pilgrim Fathers so constantly figure in poetry, oratory, comic strips around Thanksgiving Day, and even advertisements? You may answer this question for yourself if you read Governor William Bradford's History 'Of Plimmoth Plantation.' For here is a story of simple people impelled by an ardent faith in God to a dauntless courage in danger, a boundless resourcefulness in face of difficulty, an impregnable fortitude in adversity, that exalts and inspires us in an age of change and uncertainty, when courage falters, and faith grows dim. Bradford's History strikes the note of stout-hearted idealism that most Americans respect, even when they cannot share it. In his pages we can read the amazing success of these humble folk in dealing with problems, and overcoming obstacles which had overwhelmed far wealthier and better organized colonies. Governor Bradford's annals, as retold by countless historians and teachers, and by poets like Longfellow, have secured for this brave little band a permanent place in American history and American folklore. The story of their patience and fortitude, and the workings of that unseen force which bears up heroic souls in the doing of mighty errands, as often as it is read or told, quickens the spiritual forces in American life, strengthens faith in God, and confidence in human nature. Thus the Pilgrims in a sense have become the spiritual ancestors of all Americans, whatever their stock, race or creed, Bradford foretold it himself in the words which you have inscribed on the tablet in this [New Hampshire] State House:

'Thus out of Smalle beginings greater things haue been produced by his hand that made all things of nothing, and giues being to all things that are; and as one small candle may light a thousand; so the light here kindled hath shone unto many, yea in some sorts to our whole nation.' "

THE AMERICAN LOYALISTS

Most Americans today appear to know little about the loyalists from Massachusetts to Georgia who went to Nova Scotia during and after the Revolution. As all the old bitterness evaporated long ago, a brief glimpse of their story may give us an illuminating sidelight on our own earlier history of which they were a part.

"Boston became the headquarters of the American Revolution largely because the policy of George III threatened her maritime

Thus out of Smalle beginings greater things haue been produced, by his hand y made all things of nothing, and giues being to all things that are

interests. 'Massachusetts Bay is the most prejudicial plantation to this kingdom,' wrote Sir Josiah Child. 'Instead of trading only with the mother country, and producing some staple which she could monopolize, Massachusetts would spite the Acts of Trade and Navigation would, trye all ports,' would trade with England's rivals, and drive English ships from colonial commerce.

"Of course she had to do all this in order to live and prosper; and every penny won from free trade (as she called it) or smuggling (as the English called it) was spent in England. Until 1760, Englishmen saw the point and let well enough alone; but the ministers of George III believed it their duty to enforce the statutes, and make Massachusetts a colony in fact as in name. Not only their policy, but their method of executing it was objectionable. . . . If American trade were regulated by corrupt incompetents three thousand miles away, Massachusetts might as well retire from the sea."*

In spite of their protests against the English policy, voiced by Otis and Thacher, when the crisis came, those who could not bring themselves to discard their traditional allegiance to the Crown left for Nova Scotia.

Sabine's "Loyalists of the American Revolution" was published in 1864, by Lorenzo Sabine, whose "home for twenty-eight years, was on the eastern frontier of the Union, where the graves and the children of the Loyalists were around me in every direction." He, as an eye witness, tells us—

"The Loyalists who, at the peace, removed to the present British Colonies, and their children after them, smuggled almost every article of foreign origin from the frontier ports of the United States, for more than half a century, and until England relaxed her odious commercial policy. The merchant in whose counting-house I myself was bred, sold the 'old Tories' and their descendants large quantities of tea, wine, spices, silks, crapes, and other articles, as a part of his regular business. I have not room to relate the plans devised by sellers and buyers to elude the officers of the Crown, or the perils incurred by the latter, at times, while crossing the Bay of Fundy on their passage homeward. But I cannot forbear the remark, that, as the finding of a single box of contraband tea caused the confiscation of vessel and cargo, the smugglers kept vigilant watch with glasses, and committed the fatal herb to the sea, the instant a revenue cutter or ship of war hove in sight in a quarter to render capture probable. When a spectator of the scene, as I often was, how could I but say to myself,—'The destruction of tea in Boston, December, 1773, in principle, how like!" pp. 13-14.

"The substance of a long dispatch from Earl Grey to Lord Elgin, in 1846, was, that the Colonists may make what they will; may buy where they please; may sell where they can. Had this State paper

* Morison "Maritime History of Massachusetts".

been framed seventy years earlier, and in 1776," what would have happened? While that may be an interesting academic speculation, it did not happen. Nevertheless, it is a suggestive fact of history which deserves pondering in connection with the human itch for power that causes many problems of government.

Copley the portrait painter was a loyalist who went to London with his family.

THE LORD CHANCELLOR BORN IN BOSTON AND HIS JUDICIAL IMPARTIALITY

JOHN SINGLETON COPLEY
LORD LYNDHURST

Son of Copley, the artist, leaving Boston at the age of two, he rose to be Solicitor-General, Attorney General, Master of the Rolls, Chief Baron of the Exchequer, and three times Lord Chancellor. The account of him in volume 1 of J. B. Atlay's "Victorian Chancellor" is one of the best biographies in print. Lord Westbury considered him "the finest judicial intellect" he had ever known. His impartiality is described by Atlay (Vol. I, 83):

> "On the Bench his lips would often be seen to move, but no sound . . . would be heard by the Bar. The Associate sitting beneath him could tell another tale: the classic instance is 'What a d———d fool the man is!—then after an interval, 'Eh, not such a d———d fool as I thought'; then another interval, 'Egad, it is I that was the d———d fool'."

HISTORY ALIVE — THE VALUE OF PICTURES IN LAW BOOKS

Dean Inge, in a lecture on "The Victorian Age", referred to Carlyle's practice of placing before him, on his desk, a portrait of the man about whom he was writing, and suggested that those who, today, speak with tolerant condescension of some of the great Victorians, might learn something by adopting this practice. It is for this reason that we have reproduced many portraits of judges and lawyers of different generations in this periodical in connection with law and legal history, in order, as far as possible, to translate names into living beings.

The practice of illustrating law books should be encouraged. In a romance called "The Old Country", by Henry Newbolt, the twentieth century hero listens to the following conversation:

"But surely in the Middle Ages they were mediaeval?'

"They were not mediaeval, they were alive."

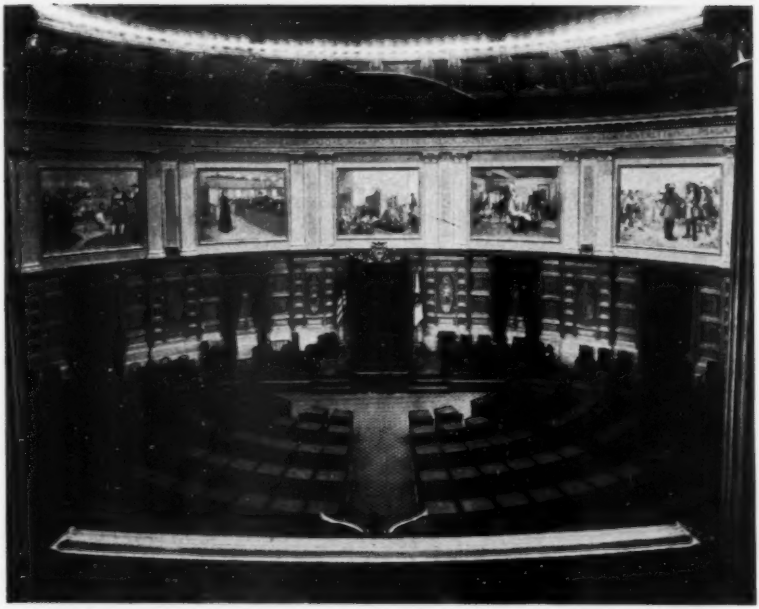
"But quaint?"

"No, alive; and a man's life does not reside in his clothes". . . .

The hero says, "I have not yet got used to your way of speaking of these ancient inhabitants. To me their names suggest stiff stone figures on dilapidated tombs; to you they seem to be in no way different from the people in this year's red book." The hero then has a dream, in which he sees and talks with people of the 14th century and listens to a vivid description of the battle of Poitiers and of the character of the Black Prince by a young officer who took part in it—such as a young officer might give today of a battle on the European or Asiatic front and of the character of his commander.

We cannot think about history intelligently unless we think in terms of struggling human beings dealing with problems of their day which were just as important for them and for us as our problems are for us today. Remembering Browning's calendar of "God's instant men call years" we should think of the story of the 17th, 18th, and early 19th centuries as if it all happened last week.

With this introduction we come to the pictures of men with whom we have associated from time to time during the short period of the past 300 years.



THE CHAMBER OF THE MASSACHUSETTS HOUSE OF REPRESENTATIVES SHOWING THE MURALS OVER THE SPEAKER'S ROSTRUM

"MILESTONES ON THE ROAD TO FREEDOM IN MASSACHUSETTS"

In 1942, in his last year as Speaker of the House, the present Governor and his father presented to the Commonwealth five murals, painted by his father, the late Albert Herter, whose murals decorate and distinguish public buildings in various other states. They represent five stages of Massachusetts thinking between 1630 and 1788. They not only distinguish the House Chamber but serve as visual reminders to our legislators of vital forces in that "eternal vigilance" which "is the price of liberty"—stages in the gradual struggle for reasonable constitutional restraints of the ineradicable human itch for power—the struggle still continuing which dates back to Demosthenes and earlier.

GOVERNOR WINTHROP AT SALEM
BRINGING THE CHARTER OF THE BAY COLONY TO MASSACHUSETTS
1630

REVOLT AGAINST AUTOCRATIC GOVERNMENT IN MASSACHUSETTS.
THE ARREST OF GOVERNOR ANDROS
1689

DAWN OF TOLERANCE IN MASSACHUSETTS. PUBLIC REPENTANCE OF JUDGE SAMUEL SEWALL FOR HIS ACTION IN THE WITCHCRAFT TRIALS
1697

JOHN ADAMS, SAMUEL ADAMS AND JAMES BOWDOIN DRAFTING THE MASSACHUSETTS CONSTITUTION OF 1780
1779

JOHN HANCOCK PROPOSING THE ADDITION OF
THE BILL OF RIGHTS TO THE FEDERAL CONSTITUTION
1788

A PREDICTION BY JAMES OTIS IN 1768

In a letter to a London correspondent, Mr. Arthur Jones, on November 26th, 1768, Otis said:

> *"Our Fathers were a good people, we have been a free people and if you will not let us remain so any longer we shall be a great people."*

See "Tudor's Life of James Otis," p. 35.

FOUR CHIEF MAGISTRATES

1. THE GOVERNOR IN 1630

and

The Puritan Conception of a "Free State Without the Realm"

JOHN WINTHROP
1587-8—1649.
Governor of the Mass. Bay Colony 1629-1633, 1637-1639, 1642-1643, 1646-1649; Deputy Governor 1636, 1644; Assistant (or Magistrate) 1629-1649.

Winthrop's portrait reflects, in its relative austerity, the conditions under which people lived and thought in the 17th Century.

"The fact which gives chief value to the study of the early history of the United States is, that in it we can see a society begin from its earliest germ and can follow its growth. It is a case of an embryo society, not however of savages but of civilized men. They came armed with the best knowledge and ability which men, up to the time of their migration, had won . . . that history

presents elements to the student of society which he can find nowhere else; . . . isolation, with the necessity of self-adjustment to the conditions*

Winthrop and others, before they left England, secured the right to bring the Charter (or government) with them, as shown in one of the Herter Murals, and when arrived they considered themselves a "free state without the realm." That they really held this view, appears from the secret instructions in 1646 to Edward Winslow, agent of the Colony, as quoted in Winthrop's Journal—"if you shall be demanded about these particulars,"

"Obj. 9. About a general governor.

"Answer 1. Our charter give us absolute power of government.

"2. We conceive the patent hath no such thing in it, neither expressed nor implied.

"3. We had not transported ourselves and families upon such terms."†

While there were no "lawyers" here then, the colonial lawmakers, like Winthrop, Dudley, Bellingham and Rev. Nathaniel Ward, appear to have been well read and capable, to a surprising degree, of governing and framing laws, some far in advance of their time, such as the earliest provision of compensation for property taken for public purposes in the laws of 1648. Ward said, in "The Simple Cobbler of Agawam" published in 1646, "I have read almost all the common law of England". He was the draftsman of "The Body of Liberties" of 1641—the first approach to a constitution containing a combination of a bill of rights and statutory provisions prepared in response to a growing demand for a statement of the law. It was not enacted at first because, as Winthrop said, they wanted to "raise up laws by practice and custom"; in other words, New England "common law".

That their independent conception persisted after the revocation of the Charter in 1684, appears in the second act under the later Province Charter of 1692 setting forth general privileges. It contained language from *Magna Carta* and emphasized the rights of free men to be governed by "the law of this Province". It was disallowed by the Privy Council, but there it was and remained and it was not forgotten. The later 18th Century reading lawyers like Otis, Adams and others, of course, knew all about it.

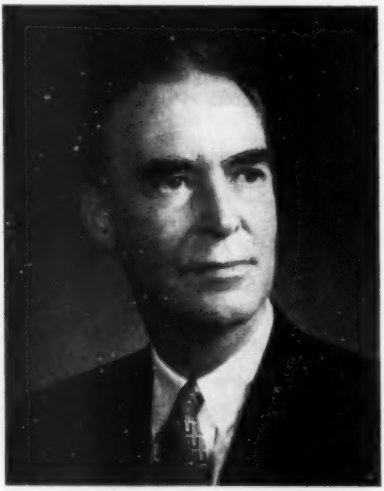
This early New England conception of a "free state without the realm" to be governed by its own laws is of peculiar interest today as, after 300 years, it seems to have become the basis of the British Commonwealth of Nations.

---

* William G. Sumner, "The Challenge of Facts".

† See "John Winthrop and the Constitutional Thinking of John Adams", Proceedings of Massachusetts Historical Society, Vol. 63, Feb. 1930; "The Government of Massachusetts Prior to the Federal Constitution," 24 Mass. Law Quarterly No. 1, Nov. 1924, which contains a quotation from a letter to Winthrop in 1646 from William Pynchon, the founder of Springfield, illustrating the discussion.

THE PRESENT GOVERNOR OF MASSACHUSETTS



CHRISTIAN A. HERTER
Governor of Massachusetts 1953
Speaker of the House 1939-42, Member of Congress 1943-52

Thomas Pownall, the Most Interesting of the Provincial Governors—the Friend and Prophet of America and First and Forgotten Patron of American Legal Education

BY

ALBERT WEST
of the Boston Bar

Strangely forgotten, especially in view of his full, friendly and prophetic understanding of the American Colonies, Thomas Pownall appears to have been the most interesting of all the Provincial governors.

Champion of American liberty from the beginning, he arrived in Boston in 1757 to succeed William Shirley as Royal Governor of the Province of Massachusetts Bay until 1760. He developed a friendship with John Adams, James Bowdoin and John Hancock which lasted throughout his life. An able administrator, he con-

cerned himself with the defenses of the frontiers and finding, at first hand, how the colonists felt. Doffing his wig and ruff, he took long walks into the countryside, taking his paints with him and picking up bits of information in the inns and taverns in the interior and along the coast, with which he later astonished the legislators especially Sam Adams who supposed that one of his colleagues was tipping him off.

THOMAS POWNALL
Governor 1757—1760
(From an early mezzotint in possession of the author.)

His view of Boston, painted no doubt as he picked up odd bits of political gossip, may be seen at the Boston Public Library.

Convinced that the French were planning to attack the Colony, Pownall determined to push the boundary of Massachusetts (now the State of Maine) further north. In May 1759 he, personally, led an expedition up the Penobscot and buried a leaden tablet near where Bangor now stands, establishing possession on behalf of George II. John Adams used a certificate of this fact when he negotiated the peace before the Commissioners in Paris in 1783.

Returning to London in 1760, he served in various posts and, paints in hand, he picked up information, made maps and friends and by 1767 was a member of Parliament. He entertained Americans whenever he could. Benjamin Franklin became a frequent house guest and close friend and William Johnson, later to become President of Columbia, was his constant visitor. He wrote his suc-

cessor as Governor of the Bay Colony constant advice as to how best to conciliate the people, which was always ignored.

As the conflict approached, Pownall became the champion of America and he was the only member of Parliament who opposed all of the measures of the Ministry which led to the revolution. He was a close confidant of his colleague, Edmund Burke, and shared with him the drafting of several laws. An outstanding authority on American affairs and an author of a monumental work on the subject, there is ample evidence to support the contention that Pownall either wrote or, what is more likely, supplied the data for Burke's celebrated speech on Conciliation.

On December 2, 1777, Pownall declared to the astonished House of Commons: "I now tell this House and government, that the Americans never will return to their subjection to the government of this country. I now take upon myself to assert directly . . . that your sovereignty over America is abolished . . . forever. The navigation act is annihilated."

At another time, this "Forgotten Man" declared that the balance of power would soon pass from the petty, jealous states of Europe to America. He told England that her "natural interest" was now in the Atlantic basin and that to assure a great era of commerce, cooperation with America and the formation of an *Atlantic Alliance* was essential.

He was overjoyed at American Independence. In a letter to James Bowdoin, written just after the peace was announced by George III, he wrote:

Richmond, Surrey, Feb. 28, 1783.

"MY OLD FRIEND,—Permitt me through you to congratulate the STATE MASSACHUSETTS-BAY on the establishment of its SOVEREIGNTY IN POLITICAL FREEDOM: & may I beg of you to render acceptable to the State & citizens the congratulations of an Old Governor.

"In congratulating the State I congratulate you a citizen participant of its sovereignty & freedom. May you live to see & have health to enjoy the progress of the blessing.

"I consider this wonderfull Revolution as the visible interposition of Divine Providence, superceeding the ordinary course of human affaires. . . ."

He intended to come to America, there to spend the rest of his days, he told Bowdoin, but a second marriage and other turns of events prevented this.

Contrary to the general belief that Isaac Royall of Medford made the first gift for legal education in America the Pownall-Bowdoin correspondence, the originals of which are in the Massachusetts Historical Society, proves conclusively that it was Governor Thomas Pownall. As early as 1778 he wrote:

"The five hundred acres of land which the Kennebec Company gave me, and which I hold in Pownalborough, I mean to give to the College in Cambridge, either as an addition to the Hollisian Professorship, or as part of the establishment of another professorship which I mean to found.

"I intend also to leave, by will, my books to the library there.

"These ideas, now in contemplation, I mean to carry into execution when I can do it without offence to the Government or laws of this country, of which I am a subject; under whose protection I live, and hold my rights and property, and to which my allegiance is due. I shall expect to hear from you in explanation of these points."

His wish was to use the money from this sale, "for the purpose of beginning the establishment of a Political Law Lectureship or Professorship, on this basis described by Cicero,—

"Constituende juris ab illa summa lege capiamus exordium quae seculis omnibus ante nata est, quam scripta lex ulla, aut quam omino civitas constituta. . . . Non a praetoris edicto, ut plerique nunc; neque a XII Tabulis, ut superiores; sed penitus ex intima philosophia haurienda juris desciplina. . . . Non (id jus civile), ac potius ignoratio juris litigiosa est, quam scientia. I mean & wish to see instituted Lectures on the Science of Polity & Lawgiving as derived from God & nature & the nature of man, so as to form the minds of the students to become efficient & good members of the free state. Sed haec posterius, this is sufficient to mark my intention."

One of these letters he sent via his old friend Benjamin Franklin, the founder of our postal system, who carried it to Paris and from there to Philadelphia in his pocket to be received by Bowdoin nine months later. Fearing it lost, Pownall drew another deed which was witnessed by John Adams and his son, John Quincy Adams. Its form, no doubt, being carefully scrutinized by the elder Adams from Massachusetts.

It was at that time in 1783 that he discussed with Adams the idea of a constitution of the United States, and apparently allayed his fears concerning the office of the executive.

To Bowdoin, he wrote,

"I wish most sincerely & anxiously that my Memorial to the Souvereigns of America may have as full & effectual operation; saying this (as this letter comes by favor of Mr. Adams) it is justice to him to mark that he does not approve my idea of an office of executive, whether Consulls, protectors, &c., &c., &c. I remain, however, clear in my opinion, if I had not convincing reasons for it yet from fears that 'if the citizens of America do not establish some efficient executive office by Constitution, they should, from the necessity of the case, be led to adopt some power that will not only (be) unconstitutional but oppugnant to & destructive of

the principles of Political Freedom on which you are founded.' Adieu, my dear Friend."

Unfortunately the land referred to was sold on a tax title and after fruitless negotiations with the purchaser the President, in the name of the Harvard Corporation, petitioned the Legislature to "take such measures, as in your wisdom you shall judge needful for the carrying into effect the judicious and generous intentions of Governor Pownall, that such a foundation may be laid for the establishment of the important professorship aforesaid. . . . " (The original may be seen at the Massachusetts Archives, State House.)

Title to the President and Fellows was finally obtained and the land was sold and thereafter Pownall was forgotten and his "judicious and generous intentions" with him. He deserves a belated but permanent memorial.

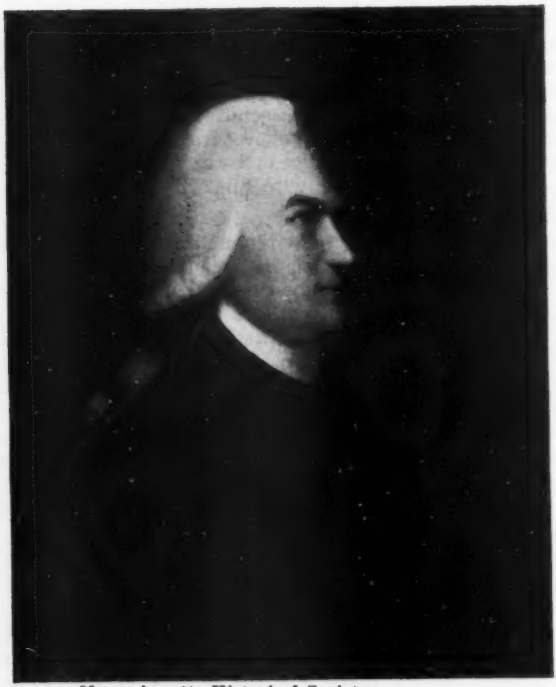
Perhaps it was because, notwithstanding his amazing foresight, Pownall lacked that modern anomaly, a publicity man, that he was consigned to obscurity. At all events he knew that he was deficient in that ephemeral quality sometimes called personality and wrote rather wistfully, "When I look back, and compare my opinions with events which seem to have confirmed them, and yet see how little effect these opinions have had, even when called for, and when duly explained, by facts, in their proper place, I am at length convinced that I have not the talent of so arranging, and of so explaining things, which I am sure are facts and truths, as to demonstrate them to others. That mind, whose faculties are most readily exerted in the search of truth, is seldom habile and efficient in the demonstration of it."

That he diagnosed his case correctly was indicated by John Adams years later in a letter to William Tudor of February 4, 1817 (Adams' "Works" 4, 241-4).

Referring to Pownall's writings, Adams said: "A reader who has patience to search for good sense, in an uncouth and disgusting style, will find in these writings proofs of a thinking mind and more sagacity than in anything that remains of his two more celebrated successors, Bernard or Hutchinson - - - I am sorry that the name of Pownalborough has been changed to that of Dresden, that of a virtuous and sensible man to that of a scene of frivolity. Pownall was the most constitutional and national Governor, in my opinion, who ever represented the crown in this province. He engaged in no intrigues, he favored no conspiracies against the liberties of America. Hinc illae lacrimae."

ANOTHER FORGOTTEN GOVERNOR

JAMES BOWDOIN
Governor of Massachusetts 1785-1787



Courtesy of the Massachusetts Historical Society
James Bowdoin in Mid Life
From a Copy by an Unknown Artist of a Miniature
by John Singleton Copley

The son of a Boston merchant, educated in the Boston Latin School and Harvard College, he avoided business and entered on a political career serving in the House from 1753 to 1757 and then in the Council, with the exception of one year, until 1775. He gradually became the leading man in the Council (then the Upper House) in opposition to the royal governors. Chosen to the Continental Congress he declined because of ill health and Hancock was chosen in his place. He was president of the Constitutional Convention of 1779-80 and a member of the drafting committee with John Adams. As the second governor under the constitution in 1785 and 1786 he faced the difficult responsibility of putting down Shay's Rebellion,

and was an active supporter of the Federal Constitution in the Convention of 1788. A man of conservative instincts and intense patriotism, superior to the popular Hancock in character, intellect, and statesmanship, he was one of the thinking "Founding Fathers" who deserved our respectful and grateful appreciation.*

* An account of him by Francis G. Wallet will be found in the Proceedings of the Bostonian Society for January 17, 1950.

OLD STATE HOUSE IN 1801
(From a painting in possession of Massachusetts Historical Society)

The Old State House now standing at the head of State Street (formerly King Street) is on the site of the earlier wooden "Town House" which was built in 1657 in the open space, reserved according to the European custom, for a market-place and general business men's resort. This first house was destroyed by fire in 1711. The present brick building was first built in 1713, burned inside in 1748 and then rebuilt within the walls of the old building. This was the meeting place of the two houses of the General Court and of the Superior Court of Judicature which sat in the Council Chamber. In front of it occurred the burning of the stamp clearances at the time of the agitation over the Stamp Act about 1765, and the disturbance known as the "Boston Massacre" on March 5, 1770, which led to the trial of the soldiers of the Twenty-ninth Regiment of Foot in November 1770. This building in the 18th Century, Professor Hosmer says, in his "Life of Samuel Adams" was the theatre of as many great events probably as any one spot in America."

THE MASSACHUSETTS JUDICIARY

"The end of government being the good of mankind points out its great duties. . . . Men cannot live apart or independent of each other . . . and yet they cannot live together without contests. These contests require some arbitrator to determine them. The necessity of a common, indifferent and impartial judge makes all men seek one. . . .

"No legislative, supreme or subordinate, has a right to make itself arbitrary. . . .

"Although most governments are de facto arbitrary . . . none are de jure arbitrary."

James Otis in "The Rights of the British Colonies" (1764).

"Every man by nature has the seeds of tyranny deeply implanted within him so that nothing short of Omnipotence can eradicate them. . . .

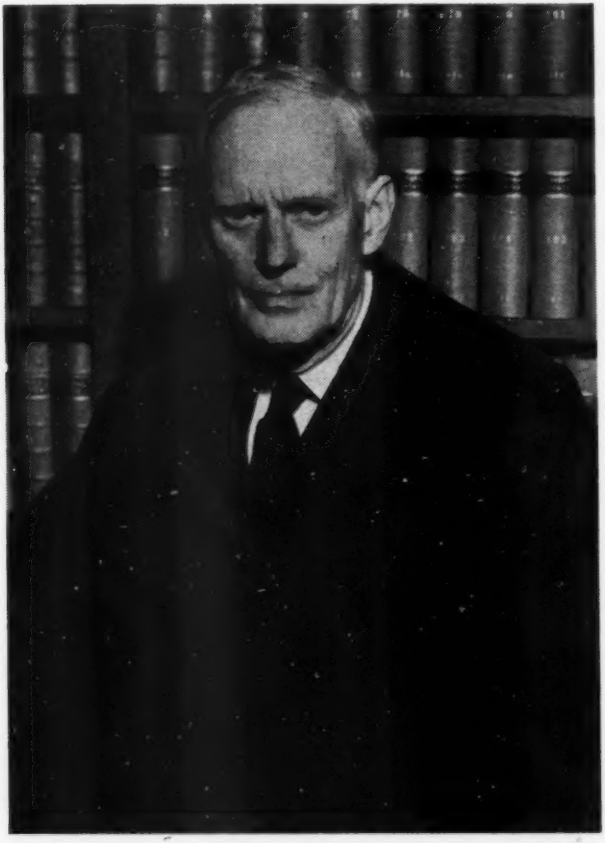
"That knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view but to provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution."

Thomas Allen and the "Berkshire Constitutionalists" in the Pittsfield Petitions to the General Court of 1776 and 1778.

Article 29 of the Massachusetts Bill of Rights:

"XXIX.—It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but, for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their office as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws."

Constitution of 1780, Chapter III, Art. I. "All judicial officers . . . shall hold their offices during good behavior . . . provided nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature." (See also the 58th Amendment of 1918.)



HON. STANLEY E. QUA*
Chief Justice, Supreme Judicial Court of Massachusetts

Photograph by Charles F. McCormick—Courtesy of the Boston Globe

* Justice Superior Court 1921-1934; Justice Supreme Judicial Court 1934-1949

THE SUPREME JUDICIAL COURT

"Great places make great men. The electric current of large affairs turns even common mould to diamond, and traditions of ancient honor impart something of their dignity to those who inherit them. No man of any loftiness of soul could be long a justice of this court without rising to his full height."—Mr. Justice Holmes, in his response to the memorial meeting of the Hampshire bar in 1891, on the death of Hon. William Allen (154 Mass. 615).

No cynic can fully appreciate the real public service of a great court during a long period, for, whatever its mistakes, it is the result of the devoted service of many able and public-spirited men. A good illustration of this is the tribute of respect by Chief Justice Stone of the Supreme Court of the United States to the memory of Mr. Justice Van Devanter, with whom the Chief Justice had frequently disagreed. Chief Justice Stone said—

> "As we recall the years of association in a common endeavor, the clash of mind with mind in the unending struggle to attain in some measure the ideal of justice under law, there lives in memory this man's devotion and loyalty to a great task, the integrity and sturdy independence with which he wrought. For these are the attributes of the judge, without which there can be no justice. They are the foundation stones of the institution which we serve."*

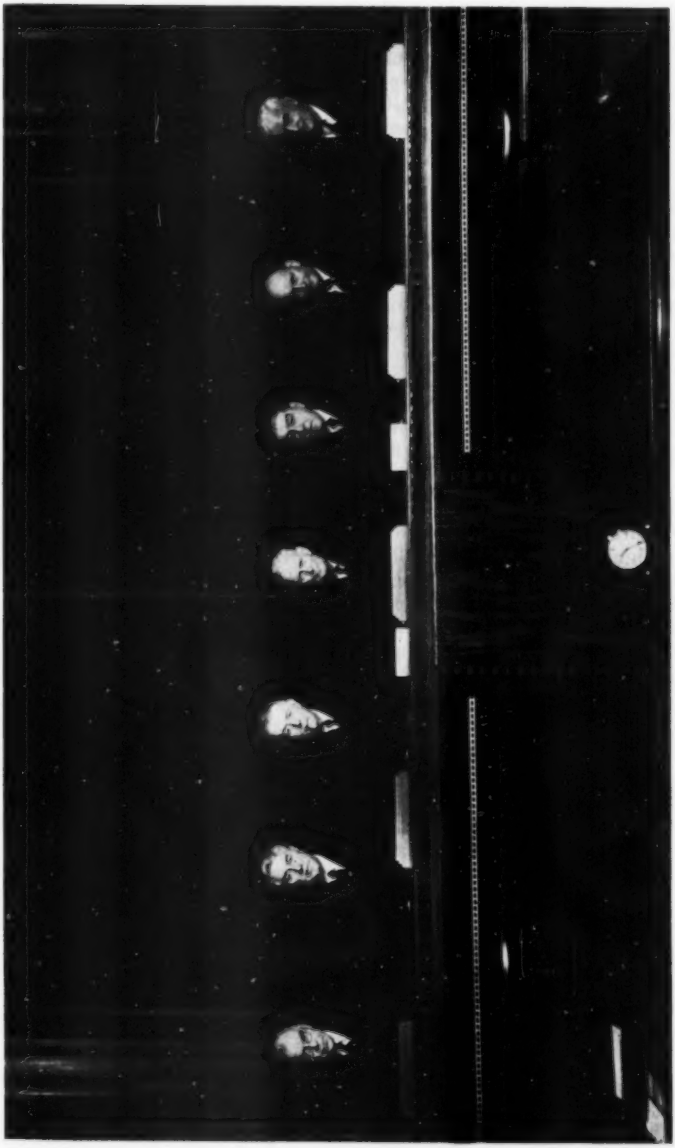
In these days of turmoil when civilized government is at stake and every decent standard of human history is violated and sneered at by modern barbarians, it is well for us to remember the lesson of history that the evils and wrongdoings of the world are not surprising—the really surprising fact is the continuous procession, through generations, of men of goodwill, ability, courage and determination to resist the forces of "Hell" and disintegration, and make it possible for all kinds of people to live together reasonably. The fact that there are and have been so many of these men in all walks of life, whether in the armed forces or in civil life, most of them forgotten or unknown, is the outstanding fact of the history of modern civilized government.

In an article on our early history the late Chief Justice Mason of our Superior Court adopted a thoughtful and unusual approach (M. L. Q. Nov. 1916):

> "The judicial history of Massachusetts is a record of the evolution of the judicial as a distinct governmental function and of the practical measures devised for its wise and efficient exercise as such. . . .
>
> "We term the process by which the several functions of government are differentiated and perfected evolution, because we are accustomed to the thought that man, individually and col-

---

* American Bar Association Journal, July, 1942, p. 459.



THE SUPREME JUDICIAL COURT 1953

Williams, J; Wilkins, J; Lummus, J; Qua, C. J.; Ronan, J; Spalding, J; Counihan, J.

lectively, is created with all his possible powers and attainments inherent, to be evolved or brought out by culture and training. Perhaps a more accurate conception of the fact is the thought of man as perpetually receiving life from an infinite source, in the measure of his capacity and his willingness to receive it, which capacity and willingness grow by means of the faithful use of the feeble powers first given, and thus that progress is by involution rather than by evolution." (See "M. L. Q.," Nov., 1916, p. 83.)

As Dean Pound said "one might say much about the place of the court in American judicial history" outside of Massachusetts; "One might discuss not a few leading cases in which the influence of the court has been decisive".

THE SONG OF THE CHIEF JUSTICE

(Reprinted, as attributed to him, without permission but without objection, from "The Bar Bulletin" on the 75th anniversary of the Boston Bar Association February 5, 1952.) Responsibility is assumed by F.W.G. in reliance on the good nature of the Chief Justice and of the spirit of Sir W. S. Gilbert. After all, Lord Mansfield and Sir William Blackstone indulged in verse. Why should not the Chief Justice of Massachusetts do so, even by proxy?

As no liberties are taken with the music of "Iolanthe", no apologies to the late Sir Arthur Sullivan are needed.

THE CHIEF JUSTICE

My court is the embodiment
Of everyone that's excellent.
We have no kind of fault or flaw,
For we know, or "find," or "make" the law.
Through two and a half long centuries
We have guarded the Bay State's liberties;
And if you think we're sometimes wrong,
Don't mention it, or you'll spoil my song;
And that, I think you'll all agree,
Is a very natural plea from me.

CHORUS OF THE BAR

A very natural pleading song
From the chief of a court that can't go wrong.

THE CHIEF JUSTICE

In sixteen hundred and ninety-two
While the clergy ruled and the bar was few,
The court was born in troublous days
And arrived on the heels of the witchcraft craze;
But it met the test and it did not fail
For it let all the prisoners out of gaol.
'Twas a most appropriate thing to do
When the court was young and the law was new.

CHORUS OF THE BAR

We like to hear him state his view
Of something with which he had nothing to do.

THE CHIEF JUSTICE

No lawyers were on, or off, the court,
For the Puritans did not like their sort
Until their business began to grow
So they needed some rules
Which the court could know;
But to get the rules in that time afar
The 18th Century needed a bar,
So the bar came slowly and took its cue
By teaching the court what the lawyers knew.

CHORUS OF THE BAR

So the lawyers knew there was time to save
By teaching judges how to behave.

THE CHIEF JUSTICE

In Story's day, as all of you know,
The Federal courts thought they "ran the show"
Whenever they thought they found a flaw
In the state court's view of the "general" law;
But Swift v. Tyson no longer rules,
And the state courts now are federal schools
To teach the circuit courts of appeal
What they must do, however they feel*
'Tis a difficult task that we have at hand
To express ourselves so they'll understand,
The Federal judges may tell you that
They find it hard to know what's what.

*Judge Jerome Frank, of the Circuit Court of Appeals for the Second Circuit, in *Richardson* v. *Com.* (42-1 U.S.T.C. 10, 142 p. 7947), where he said, "In searching for the correct legal rule to be used in reaching our answer, we are not *here* compellel by *Erie R.R.* v. *Tompkins* to play the role of ventriloquist's dummy to the courts of some particular state."

CHORUS OF THE BAR

He's talking now of the present crisis
And a rule once known as stare decisis.
The common law is a wonderful thing
When some of our judges have their fling.

THE CHIEF JUSTICE

The court is aware that it would be nice
If all its opinions were more concise;
But, in the West, long opinions are
Alleged, by the court, to be due to the bar.
Of course, I know, this may seem queer
But, perhaps, it is more or less so here;
For you doubtless like to have the court
Make your case a matter of grave import
So that your client may promptly feel
The case was one that deserved appeal.

CHORUS OF THE BAR

There may be something in what he says
For a client is serious when he pays;
But war-time economists hold the view
That opinions ought to be "rationed" too.

THE CHIEF JUSTICE

I am rather surprised that a chief justice
Is expected to sing a song like this;
Perhaps my colleagues can dance and sing,
For Judge Wilkins can do most anything,
But since it was done by my predecessor
I have taken my cue as his successor,
And borrowing some of his earlier verse,
I am adding to it for better or worse.

CHORUS OF THE BAR

'Tis surely wise for him to refrain
From writing the song all over again;
But we hope his additions will be worthwhile
So that we can compare their poetic style.

THE CHIEF JUSTICE

We know that it's one of the Bar's vocations
To gather itself in Associations
To do what nobody else can do
For the Court and the Public expect you to
And, so, for this notable celebration,
I bring you the court's congratulation.

CHORUS OF THE BAR

That he should sing us congratulations
Has really exceeded our expectations.

THE CHIEF JUSTICE

At Plymouth I told you once in June
That if you don't think the court's in tune
And you think we're mistaken, write me how
I asked that then and I ask it now.
And if you do, please don't just pout,
But read the opinion and think it out.
For you may find you are the one that's wrong.
And so these lines don't spoil my song.

CHORUS OF THE BAR

We thank you! It's a nice thing to do
For a court to ask for a lawyer's view.
But we wonder how many would prefer
To think and state how the court may err
Instead of enjoying the easier sport—
The habits of lawyers,—to "cuss the court"
But your lines are good for the end of a song
And we realize, sir, that we may be wrong.

THE TRIAL OF THOMAS MAULE FOR CRIMINAL LIBEL IN 1696

(About 40 years before the famous trial of John Peter Zenger in New York)

This trial took place before three justices of the Superior Court of Judicature and a jury in Salem three years before the act creating the Court was finally allowed by the Crown.

Thomas Maule was a shrewd, cantakerous and successful Quaker shopkeeper in Salem who, among other activities, seems to have loaned a good deal of money, but did not believe in charging interest —a rather rare virtue in those days. He was a leader among the Quakers. He did not think the Puritan clergy and governor of the Province were any better than they should be and said so repeatedly in picturesque language. Finally he wrote a book entitled "Truth Held Forth and Maintained" which he sent to New York to be printed. In it he said things which so annoyed the clergy and the government that he was arrested and indicted and he demanded a jury trial. He was represented by Dr. Benjamin Bullivant, a Boston apothecary who frequently acted as lawyer because there were no other lawyers. He filed various pleas which were overruled and Maule was "left to say for himself" from that point on. The Court was hostile and he tried his case adroitly and appealed to the jury for "a just verdict" and secured an acquittal.

The case is briefly reported in volume 1 of Peleg W. Chandler's "American Criminal Trials," in the same volume with the Zenger Case. It is much more fully reported by the late Matt B. Jones in volume LXXII No. 1 of the Essex Institute "Historical Collections." Jones concludes, "When one considers Maule's position as a local leader in an unpopular religious sect and that his indictment involved religion as well as politics, while Zenger, a popular idol in New York was defended by one of the ablest lawyers of his day [1743]—it must be conceded that the Salem Quaker won the first victory for freedom of the press in America under conditions that reflect great credit upon the puritan jury that set him free"

Chandler suggests that "the general feelings of disapprobation" over the witchcraft proceedings in 1692 "did much to render jurors independent of the court," of judges who were not trained lawyers, and Maule ingeniously alluded to the witch prosecutions in his defence.*

* The correspondence between William Cushing and John Adams in 1789 published in the "Quarterly" Vol. XXVII No. 4, Oct., 1942 from the Cushing papers in the Massachusetts Historical Society, suggests that if Cushing had continued as Chief Justice instead of Dana the law of criminal libel in Massachusetts would have improved earlier.

BRIEF OUTLINE OF THE HISTORY OF THE COURT

The Puritans of the 17th Century in New England did not like lawyers, but some of the clergymen and laymen were well-read in law, and they were good legislators.*

Under the Colony Charter, the Court of Assistants was a court and the legislature also exercised judicial, in addition to its legislative, functions, as in the case of the dispute over Goody Sherman's sow in 1634, which led to the separation of the General Court into two houses, and the birth of the office of Speaker of the House.**

After the revocation of the Colony Charter, in 1684, there were various judicial arrangements before, during and after, the Andros government, which was overthrown in 1689. The new Province Charter arrived in Boston on May 14th, 1692. It provided the Great and General Court with authority to erect and constitute judicatories, courts of record, and other courts, with an appeal to the Privy Council in civil causes. The Governor and Council were made a Court of Probate. The governor, with the advice and consent of the council, was authorized to appoint judges, commissioners of Oyer and Terminer, etc. Without waiting for legislative provision, in June, 1692, Governor Phipps, under the influence of Cotton Mather, appointed a special Court of Oyer and Terminer for Suffolk, Essex and Middlesex—an apparently illegal tribunal which conducted the witchcraft trials during the next few months.

In November, 1692, the Superior Court of Judicature first came into existence, by Chapter IV of the Province Laws. It was a court for the entire province, consisting of a chief justice and four other justices, with jurisdiction of all common law actions and all crimes. The reaction against the witchcraft hysteria had set in. Under the charter all laws took effect, but were subject to the "Royal Disallowance" within three years. The Governor and Council appointed William Stoughton, Chief Justice, Thomas Danforth, Wait Winthrop, John Richards and Samuel Sewall.

"The first term of the court was held at Salem on the third of January, 1692-3, as a court of assize and general jail delivery, being a special term, occasioned by the great numbers still in jail upon the charge of witchcraft, all of whom were discharged." It is sometimes forgotten that, as compared with other places at that time, the hysterical epidemic was shorter and less virulent in Massachusetts, although Massachusetts has been singled out as a continuous target.***

For various reasons, among others, a provision in the act creating a *separate* Court of Chancery, the act of 1692 and succeeding drafts were "disallowed" by the Privy Council, but the judges continued to sit—being recommissioned in 1695 under a revised act which was

* See Nathan Matthews' "The Results of the Prejudice Against Lawyers in Massachusetts in the 17th Century," 13 M. L. Q. No. 5, p. 73 (May 1928).

** Winthrop's Journal, Vol. II, 64-66. 116-120, 164.

*** Washburn's "Judicial History" p. 153; Ellis "The Puritan Age in Massachusetts" pp. 556-564; Kittredge "Witchcraft".

also "disallowed." Finally, by Chapter 61 of the Acts of 1699, the court was permanently established as the "Superior Court of Judicature, Court of Assize and General Gaol Delivery," with civil and criminal jurisdiction, "and generally of all other matters, as fully and amply to all intents and purposes whatsoever as the Courts of King's Bench, Common Pleas and Exchequer within His Majesty's Kingdom of England have, *or ought to have.*"

While the judges in the colony and province were educated men, there were only four trained lawyers on the court prior to the Revolution,—Benjamin Lynde, Sr., Paul Dudley, Edmund Trowbridge and William Cushing. In view of this fact, as a bar developed early in the 18th century, it became the natural function of the bar to formulate and suggest judicial standards and practice.

In 1774 King George III undertook to pay the salaries of the judges, previously controlled by the General Court. This created great excitement. All the judges refused except Chief Justice Oliver. John Adams, fearing violence to the person of the chief justice in the form of tar and feathers, a common practice, suggested impeachment by the House. The House accepted the suggestion and, while no action was taken by the council, the juries refused to serve under the impeached judge. This practically stopped the sessions of the court.

By an act of July 17th, 1775, all the justices of the court then holding commissions together with all other civil and military officers appointed by the Provincial Governor were removed by the General Court. Others were appointed by a major part of the Council, which was then acting in the absence of any governor.

John Adams was made chief justice, and shortly thereafter was succeeded in that office by William Cushing. It is interesting that Jedediah Foster, of Brookfield, a much neglected figure in our history, when appointed to the court in 1776, resigned his seat in the council as incompatible with the office of judge, and thus set a healthy precedent which was embodied in the constitution (See Quincy Reports, 341). The 9th article of the 6th chapter of the Constitution of 1780 continued the court and judges in office until other persons were appointed. On February 16th, 1781, Governor Hancock reappointed and commissioned Chief Justice Cushing and Associate Justices Nathaniel P. Sargeant, David Sewall and James Sullivan, directly under the provisions of the Constitution, as members of the "Supreme Judicial Court," Foster having died in November,1779.

The revolutionary court held its first session in Ipswich, June 18, 1776, in uncertainty as to their reception, with Cushing, Foster and Sullivan present. Judge Foster wrote, "the court was opened here this afternoon with universal consent and a speech" from the chief justice to the grand jury. "The appearance here is ominous for good. How it will be in other counties I know not but I believe peaceable and contented." (Foster papers in Am. Antiquarian Soc. and Quincy's Reports, 341.)

Thus while there has been a change of name, the justices who sit in that court today are the successors, in regular course, of the judges appointed to the same court in 1692.

Slavery Abolished by the Court

One of the earliest outstanding accomplishments of this Court after the adoption of the constitution was the abolition of slavery by judicial decision in 1781 and 1783. Although slavery was recognized and slave sales advertised, Chief Justice Cushing, for the Court, applied the first article of the Bill of Rights directly as law, and charged the jury that slavery could not exist under it.

The First Modern Administrator in Massachusetts

The draftsman, at the age of twenty-eight, of the "Essex Result" (a neglected historic document of 1779 preceding the Massachusetts Constitution and calling for a "Bill of Rights"), Theophilus Parsons became the leader of the bar. In 1806, he was appointed Chief Justice, without notice. In the six years before his death in 1813, he started the modern administration of justice in Massachusetts. An account of him appears herein.

Chief Justice Parker, who succeeded him, for about 16 years with the assistance of strong associates, continued the high standard until his death in 1830 when he was succeeded by Lemuel Shaw who served for 30 years and became the great outstanding figure in the history of the Court. He was appointed by Governor Levi Lincoln of Worcester who summoned the assistance of Daniel Webster to push Shaw into accepting the position.

These men and their associates and successors have been living examples of "judges as free, impartial and independent as the lot of humanity will admit," called for by the 29th article of the Massachusetts Bill of Rights (see p. 30).

The Political and Intellectual Story of Equity

As the lack of adequate equitable remedies for almost two centuries was the weakest spot in our judicial history, the story deserves attention. The Crown feared a local chancery court and claiming the exclusive right to create one "disallowed" the acts of 1692 and 1695.* The Act of 1699, already quoted, provided all the jurisdiction which the English courts had "or ought to have."

What did these last four words mean? The early New Englanders do not appear to have objected to equitable *remedies*. The prejudice seems to have developed against a *separate court* on the English model. It seems likely that the General Court of 1699 intended, by the words "or ought to have," to leave it to the gradual course of judicial decision to determine what equitable remedies were needed and should be used here. There being few trained judges the development did not take place.

This suggestion when stated in 1946 in 31 Mass. Law Quarterly No. 2, 56-60 resulted in an exchange of views between the present writer and Prof. Mark Howe who disagreed with the suggestions

* See Washburn's "Judicial History of Massachusetts," 158, 166-168.

in an interesting letter published with the writer's answer in 32 Mass. Law Quart. No. 3, Oct. 1947, pp. 49-61, both of us citing Woodruff's "Chancery in Massachusetts," 5 Law Quarterly Review (reprinted in the Boston University Law Review for June 1929, 168-192). A discussion by William B. Sleigh, Jr. of the law in Maine where the court seems to have been somewhat ahead of the Massachusetts Court also appears there. We know today that equity jurisdiction in some court is essential for justice as well as Sir Thomas More and Lord Ellesmere knew it in their day and better than Lord Coke knew it. We believe the puritans knew the need of justice whether it was called "law" or "equity" and intended the courts to have the tools of justice but political prejudice intervened and the courts did not dare to use equitable tools.

In the 18th century the legislature exercised judicial functions in the face of growing opposition. As lawbooks were scarce and as there were no printed reports and few trained lawyers or judges, probably "much informal equity was administered" without knowing it. The prevailing view and practice, at that time, was described by Benjamin Pratt, one of the leading pre-revolutionary lawyers in Massachusetts, who was appointed, in 1761, Chief Justice of New York:

> "There is no court of chancery in the charter governments of New England, nor any court vested with power to determine causes in equity, save only that the justices of the inferior court and the justices of the Superior Court respectively have power to give relief on mortgages, bonds and other penalties contained in deeds: in all other chancery and equitable matters both the Crown and subject are without redress. This introduced a practice of petitioning the legislative court for relief, and prompted those courts to interpose their authority. These petitions becoming numerous, in order to give the greater dispatch to such business, the legislative courts transacted such business, by orders and resolves without the solemnity of passing Acts for such purposes; and have further extended this power by resolves and orders beyond what a court of chancery ever attempted to decree, even to the suspending of public laws, which orders and resolves are not sent home for the royal assent. The tendency of these measures is too obvious to need any observation thereon."

The tenacity of the prejudice against judicial equity, the effects of which are still noticeable in the relative lack of familiarity with broad equitable principles, was illustrated in 1846. As a result of Judge Story's books and other publications, there was then an increased understanding of the subject and a bill was supported by the lawyers in the legislature and defeated by the laymen. As reported by Peleg Chandler, a member of the House:

> "The most effective speech against it was made by Mr. Crowninshield, of Boston, who expressed a wish that the equity power which had been given to the Supreme Court from time to time might be taken away; he held up before the House the large

volume containing the bill, answer, etc., in the case of *Flagg* v. *Mann* (2 Summers, 486) and said: 'Why, Mr. Speaker, did this House ever see a bill in equity? If not, I will show you one.' This theatrical climax was received with a burst of applause, and a gentleman who spoke on the same side declared that there was no need of argument; that the book had settled the question. There was some indignation when it came out later that half of the book was blank leaves, and that the case contained no more testimony than do many common law cases." (See 8 Law Reporter 556, quoted by Woodruff.)

The constitution of 1780 intended to stop the legislative justice of the 18th century and put judicial business in the court. The 11th article of the Bill of Rights provided that "every subject ought to find a . . . remedy . . . for injuries or wrongs"; but the court seems to have lacked the constitutional vision to provide needed equitable "remedies" until 1877. At that time Sidney Bartlett, then the leader of the bar, was so stirred by an opinion (obviously, in *Suter* v. *Matthews*, 115 Mass. 253) that he joined John L. Thorndike (then a young man, and later the donor of the Thorndike Library) and secured the passage of the present statute (drawn by Thorndike) recognizing full jurisdiction according to "the general principles of equity jurisprudence." Mr. Thorndike himself told the story to the writer. The words of the Act of 1699, when read in connection with the constitutional provisions, suggest that the Act of 1877 was, like some other statutes,—merely a declaratory act "in aid of the judicial department" rather than an original grant of jurisdiction.*

The conquering of this prejudice against equity in the interest of justice has resulted from what Judge Story, in an address to the bar in 1820, called "the habits of generalization" developed by a more liberal education of lawyers, and the work of modern legal scholars has proved the vision of the following prediction of 1810. Story, while at the bar and in the House, urged a chancery court in 1808.

A Prediction of Erastus Worthington of Springfield in 1810

Erastus Worthington, a learned Springfield lawyer with vision, writing (before the birth of American law schools) in an address to the Massachusetts legislature in 1810, in support of equity jurisdiction, said:

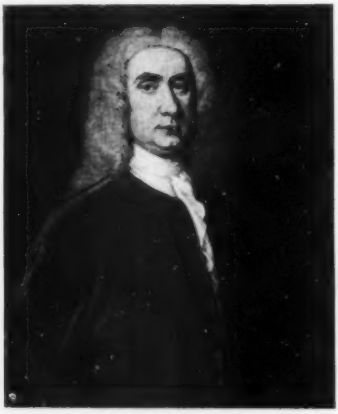
> "The cry of innovation has become a commonplace topic with some men; it is used at all times, and on all occasions . . . but the day is dawning when . . . citizens may become illustrious for their moral and legal researches when as great honours shall be bestowed on her Puffendorfs, her Grotiuses, her Cokes and her Pothiers, as she has bestowed on her heroes and political sages; when legal science will be as much an object of inquiry as the science of government."

* This aspect of the matter was not covered by Mr. Justice Hammond's illuminating opinion in *Parker* v. *Simpson*, 180 Mass. 334.

The "creative" aspect of legal history was also reflected in the remark, attributed to Lord John Russell, that "thirty years was the *usual* period of gestation for any measure of law reform." At times, it is longer. It would be healthier if it were, sometimes, shorter.

THE 18th CENTURY BAR

Charles Warren has told us in his "History of the American Bar" that in the American colonies the bar of trained individuals beginning we believe in Maryland, developed before the courts, who were composed mostly of laymen, often well educated and receptive enough to learn from the ablest lawyers. In the early 18th century when the economic conditions of growing Massachusetts needed a trained bar and better courts, a bar developed.



JOHN READ*
Attorney General 1725-1727
(From a portrait by Smibert)

The first real leader of the bar appeared in Massachusetts about 1722 from Connecticut in the person of John Read, who trained both the bench and his colleagues at the bar in the value of legal study, formal procedure, and restraint of their habitually verbose tendencies. In this he was supported by another leading lawyer, Robert Auchmuty, who was also a judge of Admiralty. Other leaders who gradually came to the front in the second quarter of the 18th century were Jeremiah Gridley, sometimes called "the Father of the Bar," Benjamin Pratt, later Chief Justice of New York, Oxenbridge Thacher, James Otis, Jr., and Sampson Salter Blowers, a loyalist who later become chief justice of Nova Scotia and served with distinction for more than 30 years.

* It is interesting that two hundred years later, Read's descendant, George Read Nutter (whose picture appears herein as a member of the Judicature Commission of 1919-20), rendered a similar but much more varied and extensive service to his profession and the public in the broader field of modern life. (See "Bar Bulletin" Vol. 23, No. 2, February, 1952 and 24 Mass. Law Quart. No. 1 Pred-Supp. Jan.-March, 1939, IX.) Nutter was vice-president of the American Bar Association for the First Circuit before the re-organization in 1936. He died early in 1937.

CHIEF JUSTICES 1692-1775

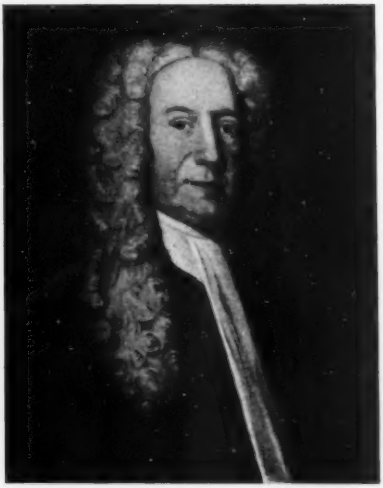
WILLIAM STOUGHTON
Chief Justice Superior Court of Judicature
1692-1701
(One of the Witchraft Judges of 1692)
(From a portrait by Evert Duychinck in the Boston Athenaeum)

WAIT STILL WINTHROP
Justice Superior Court of Judicature
1692-1701
Chief Justice 1701, 1708-1717
(One of the Witchraft Judges of 1692)

ISAAC ADDINGTON
Chief Justice Superior Court of Judicature
1702-1703
(From a portrait in the New England Historical and Genealogical Society)

SAMUEL SEWALL
Justice Superior Court of Judicature
1692-1718
Chief Justice, 1718-1728
(One of the Witchraft Judges of 1692 who, later, publicly repented his part, in the Old South Meeting House)

CHIEF JUSTICES 1692-1775



BENJAMIN LYNDE, SR.
Justice Superior Court of Judicature
1712-1729
Chief Justice, 1729-1745

PAUL DUDLEY
Justice Superior Court of Judicature
1718-1745
Chief Justice, 1745-1751
(From a portrait in the Supreme Judicial Court at Boston)

Note—Stephen Sewall was Chief Justice from 1752-1761.

From photo by Baldwin Coolidge

THOMAS HUTCHINSON
Chief Justice Superior Court of Judicature
1761-1769
(From a portrait by Copley in the Massachusetts Historical Society)

BENJAMIN LYNDE, JR.
Justice Superior Court of Judicature, 1745-1769
Chief Justice, 1769-1771

THE END OF AN ERA

PETER OLIVER*
Chief Justice, 1772-1775

Hon. Albert Mason, formerly Chief Justice of the Superior Court, wrote:

"Peter Oliver, the last chief justice under the provincial government, was a graduate of Harvard in 1730, and, although he entered no profession, was a man of much culture. He had served upon the Court of Common Pleas for Plymouth County eight years prior to his appointment to the Superior Court in 1756. For sixteen years he served as associate justice of the latter court to the acceptance of every one, winning a high reputation for accurate learning, fearless independence of action, and uncomprising integrity. In 1772 he was appointed chief justice, and in little more than two years was among the most intensely hated of the adherents of the Crown. As conscientious in his political errors as any patriot who assisted in burning his effigy or his beautiful home at Middleborough, his fidelity to convictions cost him temporary obloquy of the gravest character, and those who cherished his good name saw the record of history made up ignoring his life-long faithful service and preserving only that which has been condemned. The record which is unjust may last for time, may have no correction in earthly annals, but, nevertheless, it can not abide to injure. If we had better means of measuring the useful service of William Stoughton, Samuel Sewall, Stephen Sewall, Edmund Quincy, Richard Saltonstall, John Cushing, and

*There is an extended account of him by the late Thomas Weston in the Massachusetts Historic Genealogical Society papers.

the other judges, it would doubtless give us higher estimates of their individual merit, and fuller appreciation of the large contribution of the provincial period to the judicial history of Massachusetts."

The cause of his unpopularity was his acceptance of the salary paid by the Crown for which he was impeached by the House as described in the account of John Adams. (See Vol. 44, p. 745, Massachusetts Archives, for original papers.)

Chief Justice Oliver's ancestor, Thomas Oliver, came from London in 1632 and settled in Boston. The chief justice, himself, was born in Boston on March 17, 1713. In 1744, he purchased land in Middleborough in what had been known as the Indian village of Muttock on the Nemasket River and made it his permanent home.

"Tradition has it, that while the English ships were in the harbor to take Lord Howe and his troops from Boston, in the edge of the evening Judge Oliver was seen coming on horseback up the hill upon which stood Oliver Hall in Middleborough, alone and covered with mud; his face haggard and careworn. Hastily entering the doorway he went to a secret closet in the great parlor where he kept his valuables, took his money and such articles of value as his saddlebags would hold, cast a long, sad look into his library, hurriedly glanced from room to room in what had been to him so delightful a home, hastily bade the housekeeper good-bye, and galloped out into the darkness of the night, never more to see the place where he had spent so many happy years and enjoyed so much with friends and neighbors.* The next morning he embarked with Lord Howe, and never after saw the land of his birth.**

"Oliver Hall remained for some years after, with most of its furniture and adornments. No monument of British influence remaining was so conspicuous as Oliver Hall.

"About midnight, after some of the soldiers of the town had returned from a hard-fought campaign, an unusual number of people seemed to be about the village, when suddenly the Hall was discovered to be on fire. No effort was made to extinguish it.*** The contents were taken out by whoever desired them, and to-day many relics of its former splendor may be found in the old houses and families of the place. The doors were taken off and may now be seen in a house some five miles away. Thus sadly ended the Provincial Era and no one knows what historical material was lost when his library, one of the best in the colony, was burned.

---

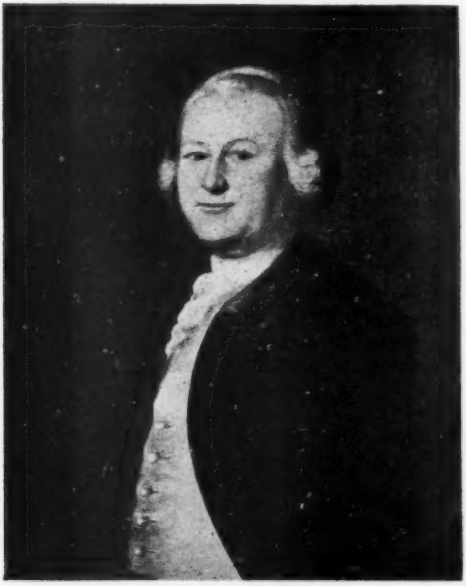
* Mrs. Mary Norcutt, account of the last time Judge Oliver was in Middleboro'.

** He, with certain other loyalists was, by act of General Court of Massachusetts, passed October, 1778, banished from the country.

*** This is from Mrs. Norcutt's description of the burning of Oliver Hall. The Hall was burned about the year 1780.

JAMES OTIS, OXENBRIDGE THACHER AND THE WRITS OF ASSISTANCE IN 1761

The constitutional history of modern states appears to be a story not only of economic forces, but of the suggestive minds which contribute continously to what Professor Channing calls "the forces of union" or, in simpler language, the minds which develop the rules under which people can live together reasonably. These minds, which operate on a large scale, are rare and sometimes generations apart.



JAMES OTIS, JR.
From the original portrait by Blackburn

Born in West Barnstable on Cape Cod about 1725, entering Harvard College in 1739, Otis graduated in 1743 and then, according to his biographer, William Tudor,

. . . devoted eighteen months to the pursuit of various branches of literature, previously to entering on the study of jurisprudence. . . . The learning he acquired in this preparatory study, was afterwards of the greatest use to him. He inculcated on his pupils as a maxim, "that a lawyer ought never to be without a volume of natural or public law, or moral philosophy, on his table, or in his pocket." How many of us do that now?

Otis at the age of Thirty-six, was Advocate General.

OXENBRIDGE THACHER

In thinking about these men and others of the "Founding Fathers" it is well for us to remember that they were reading lawyers—thoroughly educated men who builded on a "foundation" of the recorded history of governments, human nature and power then available—far better educated, informed and thoughtful than most of us are today. They are not "museum wax works."

To enforce the navigation acts, the Crown officers applied to the court for a writ of assistance which enabled the holder to search any house or ship, to break down doors, open trunks and boxes, and seize goods at will. These general writs had been used in England for a long time, and a few of them had been issued in the colonies. The announcement that the Sugar Act was to be enforced caused more alarm at Boston than the taking of Fort William Henry had, three years earlier. There was doubt as to the legality of the existing writs, and the death of the old king put an end to whatever virtue there was in them. The collectors applied for new writs, and the merchants determined to oppose their being granted.

The merchants applied to Thacher and Otis to defend them. Otis resigned his position as Advocate General and, according to Tudor, he (and probably Thacher also) refused fees, "though very great ones were offered."

"The opposition of Thacher gave the government great uneasiness, his disposition and habits secured public confidence; and while his moderation preserved him from imputation of ambition, his

James Otis, Jr., Arguing Against the "Writs of Assistance" in the Council Chamber of the Old State House, February, 1761
From the painting in the State House, Boston, by Robert Reid

learning and ability gave weight to his opinion." John Adams said "they hated him worse than they did James Otis or Samuel Adams and they *feared* him more." Tudor's "Life of James Otis," p. 58.

On a dull February day in the council chamber of the Old State House sat the five judges with all the barristers of Boston and of Middlesex County, seated at a long table or standing about the room.

Jeremiah Gridley, the Attorney General, and the former teacher of Otis, supported the legality of the writs. Thacher replied, dissecting the technical argument, and then came Otis.

We must go across the water to an Englishman for the unqualified sentence which the facts seem to warrant,—to Lord Acton, who has been described as "a scholar among scholars," who said,*

"James Otis spoke and lifted the question to a different level, in one of the memorable speeches in political history."

Lord Acton compares the situation with the case of Charles I "with his shipmoney" [which John Hampden resisted] and James II "with the dispensing power" [which led to his abdication and the end of the Stuart kings] and concludes, "There are principles which override precedents." Otis as Channing suggests, applied those principles to "the ordinary everyday affairs of political life."

While the actual surviving notes of his argument are meagre, yet remembering that Otis argued for hours, we may feel morally certain that this man, who at once became both the intellectual and the political leader in Massachusetts for the next seven or eight years, working with Samuel Adams, the organizer, put into his widely read pamphlets of 1763 and 1764, not only the substance of the ideas, but, in many cases, the actual phrases, which he used in his great argument, in which he first poured out on an astonished community the results of eighteen years of reading, reflection and experience in action. We need not think that we do not know what Otis said which stirred not only the imagination of the public, but, most important of all, the imagination and intellectual enthusiasm of the young John Adams, who, as he describes himself, was sitting in the court room "lost in admiration" and "looking like a short, thick Archbishop of Canterbury."

It was the case of the Writs of Assistance which resulted in the fourteenth article of the Massachusetts Bill of Rights and the fourth amendment to the Constitution of the United States prohibiting unreasonable searches and seizures.

In speaking of Magna Carta, Pollock and Maitland, in their "*History of English Law*," say "in brief it means this that the king is and shall be below the law." Thinking close to human nature and its tendencies, Otis carried this principle of Magna Carta further for the protection of the people. He said, in substance, legislators are men, and legislatures, like kings, must be below the law. But how shall they be below the law? He answered, there are certain

* "Lectures on Modern History" by John Edward Emerich Dalberg, First Baron Acton, London, 1906, pp. 305-307.

fundamental principles which must be recognized even by Parliament, and these principles are applied by independent and impartial courts of justice. He was not advocating "revolution." He was urging fundamental reform in British colonial regulation and administration.

The writs were issued in spite of the efforts of Otis; but his argument, supplemented by his pamphlets on "The Vindication of the House of Representatives" and on "The Rights of the British Colonies" and other pamphlets, is today part of our constitutional history of freedom in Massachusetts because, in the words of Horace Gray, it "foreshadowed the principle of American constitutional law that it is the duty of the judiciary to declare unconstitutional statutes void."

Otis was the target of caustic criticism in his day as shown by Horace Gray's notes in "Quincy's Massachusetts Reports Between 1761 and 1772." The Crown officials called him "a madman" (p. 442). But in the midst of all the tumult, he was a legal philosopher as his writings demonstrate. His character as a man is indicated by his action after he was hit on the head and seriously injured by a customs officer in 1769. He brought suit and received a verdict of £2000.00 with costs. The defendant then apologized in writing and Otis said in substance that he could not accept damages from a man who apologized. So he waived the damages and accepted only his costs. That was the act of a gentleman with standards.* The injury doubtless accelerated his later tragic derangement.

NOTE

The fuller account of Otis referred to will be found in the Proceedings of the Bostonian Society for 1935, reprinted in the Massachusetts Law Quarterly for May 1935. For an interesting account of the influence of Otis and Oxenbridge Thacher and their writings, see "The Literary History of the American Revolution," by Moses Coit Tyler, Vol. 1, 30-56 and 89-90; for the position and thinking of the Loyalists, see pp. 293-383.

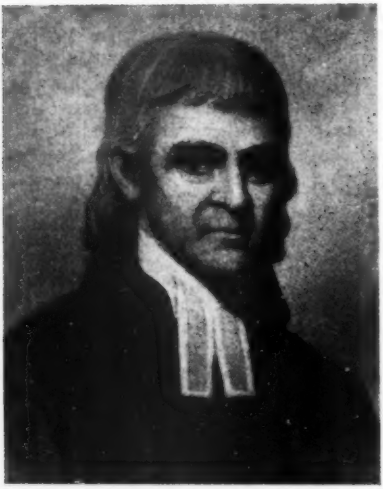
For those who are interested in learning more of Otis we refer to the edition of those of his writings which have survived by Prof. Charles F. Mullet in the University of Missouri studies.

For various accounts of Otis see Tudor's *"Life of James Otis,"* an article by J. H. Ellis in American Law Review for July 1869, Hosmer's *"Thomas Hutchinson,"* and a good brief account by Prof. Samuel E. Morison in the *"Dictionary of American Biography."* Prof. Harlow in his *"Life of Samuel Adams"* makes some rather caustic, critical references to Otis.

Quincy's Reports contains voluminous notes on the case of the Writs of Assistance by Horace Gray (later Chief Justice).

* The assault took place in the British coffee house on the present site of 60 State St. The story is told, with copies of most of the papers, in Tudor's "Life" (pp. 362-366 and 503-506). The originals are all on file in the office of the Clerk of the Supreme Judicial Court for Suffolk County.

THOMAS ALLEN AND THE BERKSHIRE CONSTITUTIONALISTS



THOMAS ALLEN

A lawyer from the Connecticut Valley once suggested to us that "two-thirds of the common sense in Massachusetts is west of Worcester." While those of us in the eastern section cannot be expected to swallow that exact fraction there can be no question that it was substantially accurate between 1775 and 1780 as to Berkshire county There were no lawyers but there were level-headed farmers up there. In Smith's history of Pittsfield chapters 18-29 (see also A.B.A. Journal, March 1936) appear the petitions of the Berkshire farmers led by Thomas Allen, the country parson with a power of statement, who fired the first shot at the Battle of Bennington. The petition of May, 1776 to the Massachusetts Legislature recited the reasons for refusing to allow the Massachusetts courts to sit in that county until a Constitution was formed as a basis of legislation. The farmers of Western Massachusetts feared a legislature sitting on the seaboard as they had feared government from a distance in London and later feared government from a distance by Congress. They said " 'That from the purest and most disinterested principle and ardent love for their country, without selfish consideration, and in conformity with the advice of the wisest men in the Colony, they ordered and assisted in suspending the executive courts in this county in August 1774.—" 'That when they came more ma-

turely to reflect on the nature of the present contest and the spirit and obstinacy of administration—" 'When they further considered that the revolution in England afforded the nation but a very imperfect redress of grievances,—the nation, being transported with extravagent joy in getting rid of one tyrant, forgot to provide against another—and how every man by nature has the seeds of tyranny deeply implanted within him, so that nothing short of Omnipotence can eradicate them;

" 'That when they considered that now is the only time we have reason ever to expect for securing our liberties and the liberties of future posterity upon a permanent foundation that no length of time can undermine,—though they were filled with pain and anxiety at so much as seeming to oppose public councils, yet, with all these considerations in our view, love of virtue, freedom, and posterity prevailed upon us a second time to suspend the courts of justice in this county'. . . . " 'That the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and ground-work of legislation'— . . . " 'That, knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view, but to provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution.' "

"Let it not be said by future posterity that—We made no provision against tyranny among ourselves." (pp. 351-353.)

These paragraphs were written 23 years before John Marshall appeared on the bench and 26 years before Marbury v. Madison. When they are compared with Marshall's opinion in that case they do not suffer by the comparison and William Cushing former Chief Justice of Massachusetts when the Berkshire petition was filed was a member of Marshall's court. In 1777 James Warren* wrote to Elbridge Gerry about the movement for a constitution. He said that "no new form of government is yet adopted. Everybody seems to wish for it and a number are incessantly moving and pressing for it. What hinders, I don't know, except downright laziness." In 1778, "the county having again by decisive majority refused to admits the courts," they again called for a convention to form a Bill of Rights and a Constitution and suggested that if it was not done they might apply to some other state for admission. The town of Concord and other towns having also demanded a convention, one was eventually held in 1779 and 1780 and the present Constitution of Massachusetts, with its Bill of Rights for "a government of laws and not of men" was adopted in 1780. Thus the Berkshire men forced the issue and got our constitution for us in 1780.

---

* Life of Elbridge Gerry, L., p. 255, James Warren—Elbridge Gerry, Jan. 15, 1777.

JOHN ADAMS—"STATESMAN OF THE REVOLUTION"

JOHN ADAMS
(From a portrait painted by Copley in London in 1783, now owned by Harvard College)

It is said that "American history is all cluttered up with Adameses." Why? Because they have had the qualities that were needed in the public service.

John Adams had, and still has, so vast an influence on American history and government that it is difficult to give an adequate idea of him and his work or to compare him with others. Moreover, they all came after most of his best work so that he was their teacher in many ways.

The fact that John Adams was the first Vice-President, and the second President, of the United States after the adoption of the Federal Constitution in 1789, has, in the past, attracted more attention to his later career and obscured, somewhat, the far-reaching importance and influence of his career in Massachusetts during the period from 1761 to the fall of 1779. But, to lawyers, he is most interesting in this period, between the time when he listened to the argument of Otis and was later chosen to represent the Town of Boston in protesting against the closing of the courts under the Stamp Act, and the time about fifteen years later, when he drafted

the Constitution of Massachusetts which, with its amendments, is still the operative instrument of government. His thinking was constantly along constitutional lines* as an alternative to what he described as "partial and irregular recurrences to original power"; in other words, to mob violence or arbitrary action. It was for this reason that at the time of the agitation against Chief Justice Oliver in 1774 he suggested formal proceedings for impeachment, based on his reading of the English State Trials, as an alternative to a possible coat of tar and feathers which he feared might be applied to the person of the chief justice in some wave of popular excitement. The significance of this suggestion, which was followed, is illuminating.

In his Tercentenary address on Boston Common in 1930, a distinguished Englishman, the Honorable Herbert A. L. Fisher, described Adams:

> "He thought about great things in a great way, and he was resolute in the pursuit of objects clearly envisaged and sharply defined. In the bottom of his heart he stood for an independent American commonwealth from the first and all the time. His irreconcilable temper, served by wide knowledge and all the resources of a ruminating mind, made him a leader of his people. His spirit arose above constitutional minutiæ to the real greatness of the occasion, to the incomparable offerings of fate. The best mind of Massachusetts, at this, the greatest hour in her history, is to be found in the writings of this rigorous, uncompromising, far-sighted man."

It is easy to belittle and attack John Adams with plausible support by quoting extravagant passages written by him in varying moods during his long life, in which he often used his pen as a safety valve; but for the discriminating reader, Mr. Fisher's estimate of him and his writings will prove to be sound.

And yet, it has been said with much truth, that, until very recently, "none of the founding fathers has been so neglected by posterity. Schoolboys still confuse him with his cousin, Sam Adams." For this reason we quote certain arresting statements about him by informed men, particularly, Thomas Jefferson, who was successively his friend and co-worker, his enemy, and then, for many years, his friend again.

In an address at George Washington University in 1927, on "John Adams and American Constitutions" Charles Warren said

---

* "John Winthrop and the Constitutional Thinking of John Adams," 63 Mass. Historical Soc. Proceedings (1929-30) pp. 91-119. See also McLaughlin "Foundations of American Constitutionalism" and "The Government of Massachusetts Prior to the Federal Constitution" Mass. Law Quart. Nov. 1924.

"The Adams whom I wish to call to your mind is not the figure which party foes and Hamiltonian historians have misportrayed as simply a vain, pompous, formal, irritable, envious fighter—but rather the man of whom Jefferson wrote that he was 'as disinterested as the Being who made him,' that 'his deep conceptions * * * and undaunted firmness made him truly our bulwark in debate,' and that 'to him more than to any other man is the country indebted for our independence'."*

This last statement is part of an interview with Jefferson in 1818 in which he said

"No history has done him justice. * * * In his zeal for independence, he was ardent; in contriving expedients and originating measures he was always busy; in disasterous times when gloom sat on the contenances of most of us, his courage and fortitude continued unabated and his animated exhortation restored confidence to those who wavered. He seemed to forget everything but his country and the cause which he espoused. . . . It was at these times when the rest of us were dispirited and silent that the loud voice of John Adams, the Ajax of the body, resounded through the hall, revived our spirits and restored our confidence. To him more than to any other man is the country indebted for our independence."

What were some of the things which this man did besides carrying the "Declaration of Independence" through the Continental Congress? He and young Josiah Quincy, Jr., both outspoken critics of the British policy, faced the opposition and criticism of the public and even of friends and family, when appealed to as lawyers by the British soldiers after the "Boston Massacre" of March 5, 1770, and represented them in one of the most famous of American cases, in order to secure a fair trial. At the meeting of the American Bar Association in Boston in 1919, Lord Finlay referred to that trial and its surrounding circumstances as the classic illustration of "the fairness with which under the most trying circumstances justice is administered by all sections of the English-speaking race; they vindicate in a striking manner the professional honor of the bar in doing its duty under the most difficult circumstances."

Quoting Warren again

"Most of the Colonies, in 1775, sought the opinion of Congress as to the form of Government they should adopt. That cautious body declined to give any definite view. Accordingly, the dele-

---

* Writings of Thomas Jefferson (Washington Ed.) II, 607 to Madison, 1787: Writings of Thomas Jefferson (Ford's Ed.) XI, 280; XII, 306, 119; to W. P. Gardner, Feb. 13, 1813; to Madison, Aug. 30, 1823; to Samuel A. Wells, May 12, 1819, Mass. His. Soc. Proc. XLVI, 405 et seq.

gates turned to Adams; and from the summer of 1775, through the spring of 1776, he was consulted by South Carolina, Virginia, North Carolina, Pennsylvania, New Jersey, New York and New Hampshire. It was a novel and unknown thing, at that time—this business of Constitution-making. To leading men in each Colony, Adams wrote long letters, setting forth his views as to the proper form of government for the new states. These letters, which were printed and widely distributed, outlined certain fundamental principles. And today the framework of the constitutions of almost all our states follows that drafted by John Adams in 1780. Rightly may he be termed 'The Architect of American Constitutions'."

It was Adams who, against the wishes of New Englanders, after Lexington and Concord, nominated Washington as Commander in Chief and carried the appointment through the Continental Congress.

As depicted in one of the Herter murals, he was chosen to draft the Massachusetts Bill of Rights and Constitution in 1779, which he did after studying George Mason's draft for the Virginia Bill of Rights of 1776. In the draft he included the famous Article XXIX for an independent judiciary, quoted on p. 30, and also Article XXX for "a government of laws and not of men," as Warren says "great words," which mean what the Berkshire men demanded —protection against "the wanton exercise of power."

He was the "father" of the American Navy. In his life of *Commodore David Porter* (pp. 16-17), Archibald Douglas Turnbull says of Porter

"He was doubly lucky, for the times were ripe for Porter, Truxton, and the *Constellation*. John Adams, father of the Navy, and, at least in this respect the most farseeing man of his day, was in the White House. Like Washington, Adams had not shared the inevitable softening of heart and brain that followed the Revolution and resulted in the complete disappearance of the American Navy. His views were those which he expressed years afterward in a letter to Matthew Carey. 'I know not how it is,' said he, 'but the landed Gentle men of all countries seem to be natural Enemies of a Navy. Holland has been ruined by this; so has Portugal; so has Spain. For years I have held up the naval resources of America as her Arm of Defence and the Instrument of her Prosperity and Glory. It is time for Somebody in this Country to think, speak, write and Act!' He had been in complete accord when Congress, against heavy opposition by limitation blocs, disarmament blocs, and pacifist blocs, succeeded in passing that Act of 1794 under which the great naval architect Joshua Humphreys was permitted to begin a new navy. Moreover, as President, Adams had brought about the creation of a separate department of the Navy, and, after Cabot's refusal

to serve, he had appointed as secretary Benjamin Stoddert, an equally ardent advocate of preparedness." (See also "John Adams" by John T. Morse, pp. 109 and 275.)

And as the final act of his public career he appointed John Marshall as Chief Justice of the Supreme Court of the United States.

Much more could be added if space permitted, for in spite of his peculiarities he had an intellectual capacity, a range of vision, a spirit of tolerance, in other words, a balance of character and intellect which made men turn to him for guidance. This enabled him to reflect in his draftsmanship and suggestions most of the permanent sentiments of his fellow citizens in such a way as to satisfy succeeding generations and in many ways to convince those who framed and ratified the Constitution of the United States. The great quality of "disinterestedness" to which Jefferson referred—the quality which balances the character of the "greatest" men—made him what he was.*

At the end of an interesting study of his services and the relative place of John Adams entitled "John Adams, the Statesman of the American Revolution," delivered in 1884, by the late Mellen Chamberlain, the former Librarian of the Boston Public Library, after discussing the causes and development of the Revolution, Mr. Chamberlain gives the following estimate:

"I see no one who could have filled his place between 1774 and 1777. * * * Doubtless there is a tendency to overestimation when our eyes are fixed somewhat exclusively upon a single actor in a cause which enlists the abilities of other eminent men. * * * He did not bring to the Revolution so large an understanding as Franklin. But Franklin lacked some things essential to the cause which John Adams possessed. He lacked youth. * * * But, save Franklin, no man in the colonies was so largely endowed as John Adams. His understanding was extraordinary. He planned well, and he executed his plans. There was no other man of so much weight in action as he. There were wise men—some, esti-

* In a recent book review of Haraszti's "John Adams and the Prophets of Progress" in the New York Tribune, after reference to Catherine Drinker Bowen's "John Adams and the American Revolution," a very readable story of John's early carrer, it is pointed out that "Preparations are being made to publish his correspondence with Jefferson and to reprint his diary and autobiography. And now Mr. Haraszti, after brooding for years over John Adams' library, which is in his custody, has produced a fascinating book largely out of unpromising sources—Adams' comments on the books he read and correspondence about them. In so doing he proves what a sound and original political thinker Adams was. Mr. Haraszti makes it clear why John Adams never has had a popular following." The book is published by the Harvard University Press.

mated by conventional standards, much wiser than John Adams; but none whose judgments on revolutionary affairs have proved more solid and enduring. There were younger men of genius and older men of greater experience in affairs; but John Adams was just at that period of life when genius becomes chastened by experience without being overpowered by adversity. * * *

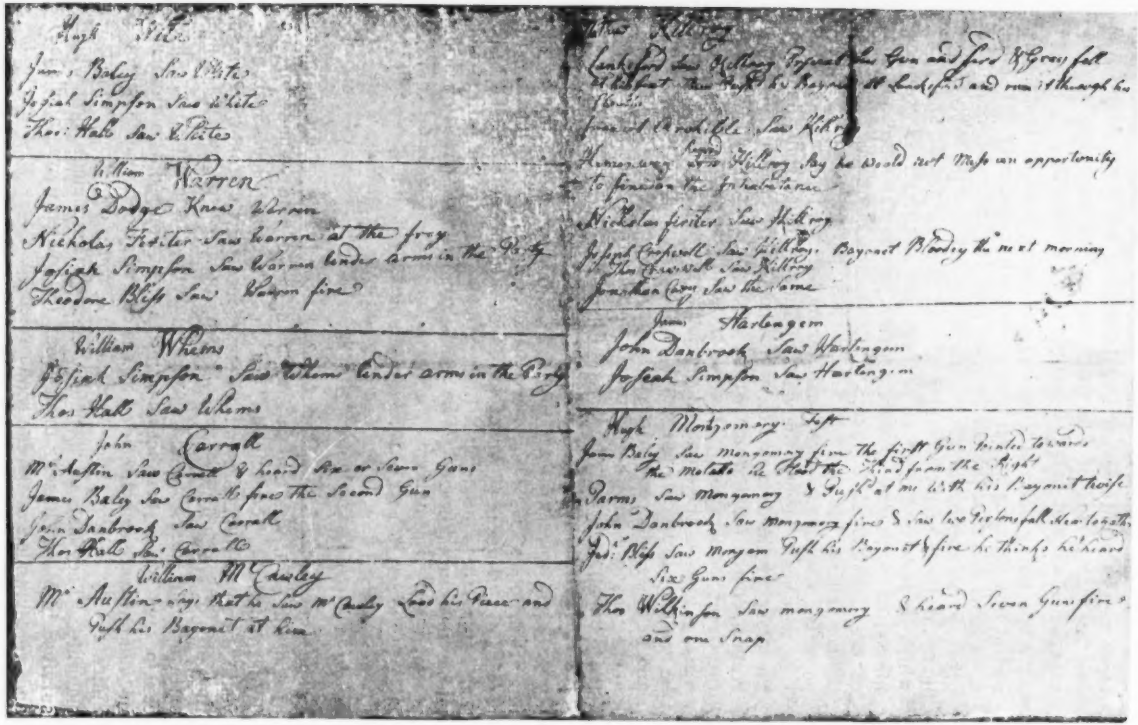
"While living John Adams had no strong hold on the people, and at one time, as he said, an immense unpopularity * * * fell upon him; and now that he is dead, even the remembrance of his great services seems to be growing indistinct. He probably lacked many of those qualities which attract popular favor, and those which he possessed, such as courage and steadfastness, were exhibited on no theatre of public action, but in the secret sessions of the Continental Congress. Passionate eloquence on great themes touches the heart to finer issues; but no syllable of those powerful utterances which, as Jefferson tells us, took men off their feet, was heard beyond the walls of Independence Hall; and even the glory of the transaction which made the old hall immortal rests upon the hand which wrote, not upon that which achieved, the Great Declaration. This ought not to be altogether so. It matters little to the stout old patriot with what measure of fame he descends to remote age, for he will never wholly die; but to us and to those who come after us it is of more than passing consequence that we and they withhold no tribute of just praise from those unpopular men who deserve the respectful remembrance of their countrymen."

The key to the political thinking of Adams will be found in the line from Pope's "Essay on Man" which Adams quoted on the title page of his "Defense of American Constitutions" published in 1787, just before the Philadelphia Convention,—"all nature's difference makes all nature's peace." Why did he put it there? That question is worth pondering today.

(Continued on Page 100)

NOTE

The story of the trial of the soldiers of the twenty-ninth regiment of foot in 1770, was told at length in one of the volumes of his "Works" and the "Bar Bulletin" No. 35, September 1930. Space prevents its repetition here but we reproduce on the following page the notes of Juror Edward Pierce of Dorchester. We in Massachusetts are not accustomed, today, to jurors' taking notes as they can in some other jurisdictions, but they not only did in this case in 1770 but were complimented by the court for doing so. The notes indicate why Kilroy and Montgomery were convicted of manslaughter. They claimed "benefit of clergy" (an ancient right which survived in Massachusetts until about 1801 when it was abolished) and were branded in the hand and released.

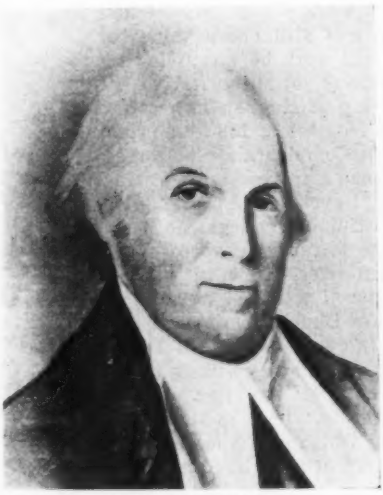


Notes of Edward Pierce of Dorchester, one of the Jurors in the Trial of the British Soldiers
Of the eight soldiers tried, Kilroy and Montgomery were convicted of manslaughter. The rest were acquitted.

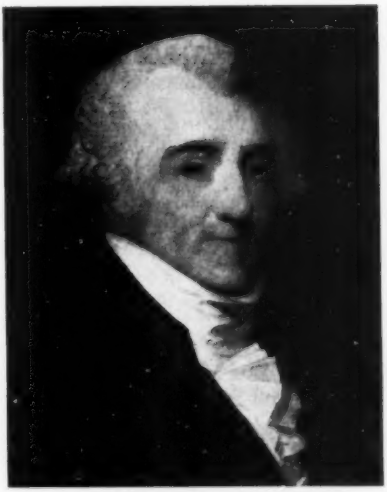
REVOLUTIONARY COURT 1776-1781

The other judges of whom there are no known portraits were Nathaniel Peaslee Sargeant of Haverhill, later Chief Justice and Jedediah Foster of West Brookfield (who died in November, 1779)

WILLIAM CUSHING
Justice Superior Court of Judicature, 1772-1775 and 1775-1777
Chief Justice of Massachusetts, 1777-1789
Justice Supreme Court of the United States, 1789-1810
Appointed Chief Justice in 1796 and declined



DAVID SEWALL
Justice Superior Court of Judicature
and Supreme Judicial Court, 1777-1789
Judge United States District Court
for the District of Maine 1789-1818



JAMES SULLIVAN
Justice Superior Court of Judicature
and Supreme Judicial Court, 1776-1782
Attorney General, 1790-1807
Governor of Masachusetts, 1807-1808

Of the eight soldiers tried, Kilroy and Montgomery were convicted of manslaughter. The rest were acquitted.

NATHAN DANE AND THE NORTHWEST ORDINANCE OF 1787 — THE REAL FOUNDER OF HARVARD LAW SCHOOL

NATHAN DANE

A member of the Continental Congress and one of the authors of the "Ordinance [of 1787] for the Government of the Territory Northwest of the Ohio," he began in 1800, and finished in 1826, his Abridgment of American Law, a work which then became indispensable to an American lawyer, and still has a value for its reports of early American law. In this work he was following the example of Viner, whose Abridgment was yet authoritative. Viner had founded the Vinerian Professorship of English Law at Oxford from the royalties of his book. The lectures of his first professor, Blackstone, had become "Blackstone's Commentaries." Dane, who had followed Viner's example, established a professorship at Harvard from the proceeds of his Abridgment. Devoting ten thousand dollars to the foundation, and desirous of stimulating legal authority as Viner had done, he provided that the lectures delivered should be published. Story's series of Commentaries, Greenleaf's Evidence, Parson's works, and Langdell's published writings were all issued in compliance with this provision. On Dane's nomination in 1829, Joseph Story was appointed as first Dane professor. Story had already refused the Royall Professorship, but was willing to become the head of the School and devote to it all the time which could be spared from the duties of his judgeship. In 1832 Dane provided funds for Dane Hall, a small building which continued as the home of the School for more than fifty years until the building of Austin Hall.*

* Thus while the school had a small beginning in 1817, its effective founder was Dane in 1829. One of his descendants, Robert G. Dodge of the Boston bar, has been a leading member of the profession for half a century.

Dane and the Northwest Ordinance

A tribute of remembrance should be paid, not only to Manassah Cutler and Rufus Putnam, whose portraits appear on the memorial stamp issued by the government, but also to the native of Ipswich who took a leading part in drafting the instrument of government for the territory—a document regarded as one of the great state papers in our history.*

Nathan Dane was born in Ipswich on December 29th, 1752, in the part now called Hamilton where the first of his family in this country had settled as early as 1638. He worked as a farmhand until he was twenty and then, in eight months with little help, fitted himself for Harvard College where he was graduated in 1778 with a high record of scholarship. He taught school for a time while studying law with William Wetmore in Salem. After entering the bar in 1782 at the age of thirty, he settled in Beverly and rapidly demonstrated his ability. He was elected to the Massachusetts Legislature during his first year at the bar, and, after three years, was chosen as a representative of Massachusetts in the Continnetal Congress with John Hancock, Nathanian Gorham, Theodore Sedgwick and Rufus King.

While there, at the time the Constitutional Convention was sitting in Philadelphia, Dr. Manassah Cutler's energy brought up the problem of the Ohio purchase by Massachusetts men for immediate consideration by the Continental Congress. The undertaking required an effective plan of government before the settlement of so large a territory was begun. The outlines of such a plan including a prohibition of slavery after the year 1800 had been suggested by Jefferson as early as 1784 but nothing came of it. When the plan for immediate immigration of New England settlers forced the issue, Dane was the real lawyer on the committee of the Congress to which the matter was referred and one of the best lawyers with imagination in the country, as shown by his later career. Dane, Melancton Smith of New York and Richard Henry Lee of Virginia, after several meetings, as Dane wrote to Rufus King three days later, "agreed on some principles—we wanted to abolish the old system and get a better one for the government of the country." All agreed finally on the draft prepared by Dane and with the exception of "a few words," it was adopted by Congress as Dane drew it, including the sixth article for the immediate prohibition of slavery which was part of Dr. Cutler's plan.

Dr. Andrew Preston Peabody, in his account of Dane, says that, so far as the anti-slavery clause in the Ordinance was concerned, it was an idea common both to Cutler and to Dane, but he continues:

> "There is another article in this Ordinance, of less moment, indeed, yet of no small importance, which must have been due solely to Mr. Dane's wisdom and foresight; namely, the provision that none of the legislatures in the territory embraced in the Ordinance should ever enact any law impairing the obligation of contracts. When the Ordinance was passed in New York, the Convention for framing the Constitution was sitting in Philadel-

* One of the best accounts of the ordinance is by John M. Merriam of the Boston bar.

phia, and this clause of the Ordinance, copied in express terms, was incorporated in the Constitution. . . ."

During the next twenty-five years or so, after his service in the Continental Congress, he was chosen on various committees connected with law revision.

Dane and the Hartford Convention

He was active in other ways including attendance at the famous Hartford Convention in 1814, where he was a restraining influence against some of the hot-heads who had ideas of disunion. He attended that convention, as he said, "to prevent mischief" and was glad that he "helped to avert danger."

His attendance at that convention was criticised at the time because it was misunderstood. The effect of the War of 1812 on New England and the threatened invasion of it, with a probable attack on Boston in 1814, created great excitement and resentment against President Madison's administration. Washington had been captured, and Castine and Belfast in Maine, also. As Dane described the situation existing in September, 1814,

". . . moderate men saw the excitement was going too far and that it was leading to evils far greater than the war itself. The fact was, before it was known who would be the members [of the Hartford Convention] such was the excitement and discontent with federal measures, that cool men and firm friends of the Union deeply interested in its preservation had some fears on this head. The convention had to steer its course between Scylla and Charyddis."

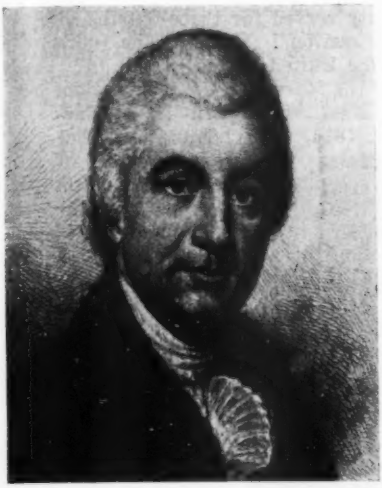
Harrison Gray Otis, Nathan Dane and George Cabot accepted their election as delegates to prevent the radical measures of extremists which would have caused a conflict with the federal government.

The resolutions of the convention passed through the hands of three committees. As Professor Morison has pointed out, "Dane was the only Massachusetts delegate besides Otis who was appointed to more than one of the major committees." Morison suggests that "possibly a majority of the Massachusetts delegates agreed in desiring more radical action than the majority [of the convention] and Otis, Cabot and Dane, combined with the others to force a moderate course" (Morison's "Harrison Gray Otis," Vol. II, pp. 111-12 and 145).

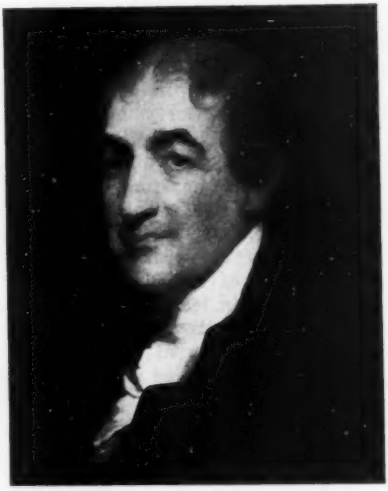
THE MASSACHUSETTS DELEGATES TO THE PHILADELPHIA CONVENTION OF 1787

Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong were appointed delegates by the General Court and commissioned by the Governor.

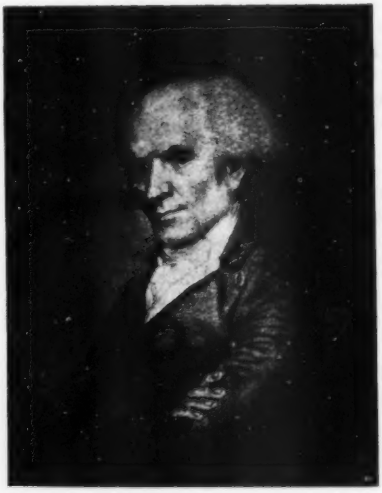
Nathaniel Gorham was born in Charlestown, Mass., in 1738 and died in 1796. He was about 49 years old at the time of the Philadelphia Convention and "when that body went in to a committee of the whole" he "was called by Washington to the chair, no doubt on account of his legislative experience and skill as a



NATHANIEL GORHAM



CALEB STRONG



ELBRIDGE GERRY

RUFUS KING

THE MASSACHUSETTS DELEGATES TO THE PHILADELPHIA CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES

parliamentarian,* and in that capacity served for three-fourths of the time that the Convention was in session." (Carson "The 100th Anniversary of the Constitution of the United States" Vol I, 147.) He was also an influential member of the Massachusetts Convention.

Elbridge Gerry of Cambridge, Mass., was born in Marblehead in 1744 and died in November, 1814, while holding the office of Vice-President of the United States. He was Governor of Massachusetts from 1810 to 1812. In the Federal Convention when he was about 43 years old he took an active part in the debates; but joined with George Mason and Edmund Randolph of Virginia in refusing to sign the Constitution. He was not a member of the Massachusetts Convention but his views were influential in leading to the first ten Amendments suggested by the Massachusetts Convention and submitted by the first Congress.

Rufus King of Newburyport was born in Scarborough, Maine, in 1755 and died at Jamaica, Long Island, in 1827. He was 33 years old at the time of the Convention and took an active part in the debates and also in those of the Massachusetts Convention. He was influential in both bodies. After the ratification of the Constitution he moved to New York and was elected United States Senator from that State. He also served later as minister to London and declined the position of Secretary of State.

Caleb Strong was born in Northampton in 1745 and died in 1819. He stands out as one of the quiet, strong men of "judgment" in the history of Massachusetts. He was about 42 years old at the time of the Convention in Philadelphia. He did not sign the Constitution because he was absent on leave on the day it was signed but he was a strong supporter of it and an influential member of the Massachusetts Convention. He became one of the first Senators of the United States from Massachusetts. In 1800 he was elected Governor and was re-elected annually until 1807 and again from 1812 to 1816, serving ten terms.

THEOPHILUS PARSONS AND THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES IN 1788

In the old meeting-house in Long Lane, now Federal Street, on the site of the present building of the Boston Chamber of Commerce, the Convention specially elected, debated and ratified the Constitution framed by the Convention in Philadelphia, in January, 1788.

> ". . . When virtuous things proceed
> The place is dignified by the doer's deed."
> —*All's Well that Ends Well.* Act II, Sc. 3.

It was the largest of all ratifying conventions containing 364 members. Five of the original thirteen colonies had already ratified the document, which was to go into effect upon ratification of nine states. The three leading states of New York, Virginia and Massachusetts were still to be heard from among those which had not then ratified. At the time the Massachusetts Convention met, it was generally conceded that a majority of the delegates were

* He had been Speaker of the Massachusetts House.

opposed to ratification, mainly because the people of the country towns throughout the state, which then included Maine, suspected the document as the product of lawyers and business men. Samuel Adams, the great popular Revolutionary agitator, was non-committal. John Hancock, the governor of Massachusetts, who was

THEOPHILUS PARSONS
(From a miniature painted from life by Malbone, in 1796)

chosen to preside over the Convention, had an attack of gout, which was often a convenient refuge for him in times of political uncertainty in these post-revolutionary days. Chief Justice William Cushing, vice-president of the Convention, presided during most of the sessions. The leader of the men who favored ratification was Theophilus Parsons, then a lawyer of Newburyport in Essex County (and later chief justice), who, next to John Adams, had the most constructive mind in Massachusetts in those days. John Adams was in London at the time, and so took no part in this Convention. By a careful and patient presentation of the reasons for ratification during a period of about a month, Parsons and his colleagues finally secured a favorable result by drafting a series of proposed amendments as suggestions to the first Congress to be held under the Constitution. These amendments, the substance of which finally became the first ten amendments known as the Federal Bill of Rights, were probably drafted by Parsons. They were then submitted to Hancock, and it was suggested to him that he might be a candidate for the vice-presidency under the new government. Accordingly he recovered from his gout, sufficiently to take his seat as presiding officer, and submitted the amendments, without discussion as to their authorship, as proposals to accompany ratification, rather than as conditions of ratification.*

* See Harding "The Struggle for the Federal Constitution in Massachusetts." The part of Parsons was described by Chief Justice Parker, who as a young man watched from the gallery. See 2 M. L. Q. No. 5, May 1917, 521.

The first of these proposals and the remarks of Samuel Adams in support of it, will, we believe, be of special interest to members of the American Bar Association today. It is generally agreed that the support of Samuel Adams was essential to ratification. On February 1st, he gave that support to the proposal of Hancock and in the course of his speech said:

"Your Excellency's first proposition is, 'that it be explicitly declared, that all powers not expressly delegated to Congress, are reserved to the several States, to be by them exercised.' This appears to my mind to be a summary of a bill of rights, which gentlemen are anxious to obtain; it removes a doubt which many have entertained respecting this matter, and give assurance *that if any law made by the Federal government shall be extended beyond the power granted by the proposed Constitution,* and inconsistent with the Constitution of this State, *it will be an error, and adjudged by the courts of law to be void.*" (See Debates of Convention of 1788, p. 233.)

The influence of Berkshire County is again evident in this convention. An illustration of the character of the sincere opposition to ratification in the minds of many of the farmers and townspeople of the state, and of the sturdy common sense with which it was answered by Captain Jonathan Smith of Lanesborough in Berkshire County, may interest our visitors as showing the character of the struggle.

One delegate, named Singletary, reflected reasons for the opposition as follows:

"These lawyers and men of learning are moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be managers of the constitution and get all the power and money into their own hands and then they will swallow up all us little folks like the great Leviathan—yes, just as the whale swallowed up Jonah."

Another delegate, who was afraid of the idea of a congress, said he "would not trust a flock of Moseses." Another said, "Had I an arm like Jove, I would hurl from the globe those villians that would dare attempt to establish in our country a standing army." Another thought that congress would establish courts like "that diabolical institution the Inquisition." "Racks and gibbets may be amongst the mild instruments of their [congress's] discipline."

In answer to such arguments Colonel Jonathan Smith of Lanesborough, toward the end of the debate, rose to the occasion as follows:

"Mr. President, I am a plain man and get my living by the plough. I am not used to speak in public, but I beg your leave to say a few words to my brother plough-joggers in this house. I have lived in a part of the country where I have known the worth of good government by the want of it. There was a black cloud that rose in the east last winter and spread over the west. (Here Mr. Wedgery interrupted: Mr. President, I wish to know what the gentleman means by the east?) I mean, Sir, the county

of Bristol. The cloud rose there, and burst upon us, and produced a dreadful effect. It brought on a state of anarchy, and that leads to tyranny. . . . It is better to have one tyrant than so many at once.

"Now, Mr. President, when I saw this Constitution, I found that it was a cure for these disorders. It was just such a thing as we wanted. I got a copy of it and read it over and over. I had been a member of the Convention to form our own State Constitution, and had learnt something of the checks and balances of power, and I found them all here. I did not go to any lawyer and ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution. My honorable old daddy there (pointing to Mr. Singletary) won't think that I expect to be a congressman, and swallow up the liberties of the people. I never had any post, nor do I want one, and before I am done you will think that I don't deserve one. But I don't think the worse of the Constitution because lawyers, and men of learning, and moneyed men, are fond of it. I don't suspect that they want to get into congress and abuse their power. I am not such a jealous make. They that are honest men themselves are not apt to suspect other people. I don't know why our constituents have not as good a right to be jealous of us as we seem to be of the Congress, and I think those gentlemen who are so very suspicious that as soon as a man gets into power he turns rogue, had better look at home. . . .

"Some gentlemen think that our liberty and property are not safe in the hands of moneyed men, and men of learning. I am not of that mind . . . these lawyers, these moneyed men, these men of learning, are all embarked in the same cause with us, and we must all swim or sink together; and shall we throw the Constitution overboard because it does not please us alike?"

It was commonly believed that if Massachusetts had not ratified, the Constitution would have failed in other states as shown by the anxious correspondence of Washington and Madison. Ratification was carried by 19 votes* and the struggle shifted to the shoulders of James Madison and John Marshall in the Virginia Convention and Alexander Hamilton and John Jay in the New York Convention. Madison in the first congress carried through the first ten amendments which were submitted and ratified.

---

* Long Lane was changed to Federal St. on the day after ratification and some local genius celebrated the event in song as follows:

"Then Squire Hancock, like a man
Who dearly loves the nation
By a conciliatory plan
Prevented much vexation
Yankee Doodle, keep it up!
Yankee Doodle, dandy!
Mind the music and the step,
And with the girls be handy.
"He made a woundy Fed'ral speech
With sense and elocution
And then the 'Vention did beseech
T' adopt the constitution.
"The question being outright put
(Each voter independent)
The Fed'ralists agreed t' adopt
And then propose amendment.
"The other party, seeing then
The people were against them
Agreed, like honest, faithful men
To mix in peace amongst 'em.
Yankee Doodle, etc."

THEOPHILUS PARSONS AND THE BEGINNING OF THE MODERN ADMINISTRATION OF JUSTICE

In a lecture delivered about 1830, Judge Story said: "Parsons was a man who belonged not to a generation, but to a century. The class of men of which he was a member is an extremely small one."

He was born in the town of Newbury, in Essex County, in 1750, the son of a clergyman. After graduating from Harvard College, he began to study law in what is now Portland, Me.; but, after the town was burned in 1775, he returned to his father's house, where he found Judge Trowbridge, one of the retired Crown judges, who was living in retirement as he was suspected of Toryism, although he was not molested. Chancellor Kent described Trowbridge as "the oracle of the common law in New England."

EDMUND TROWBRIDGE

When young Parsons returned, Trowbridge brought to the house his library, which was said to be the best in New England, and devoted himself to teaching Parsons law. Parsons was, therefore, probably the best trained lawyer in Massachusetts. He began practice in Newburyport and at the age of 28 first came to the front in the State as the leading mind in the convention of delegates from several towns in Essex County which met in Ipswich in 1778 and published their objections to the draft constitution of that year which had been drawn by the legislature and submitted to the towns in the State. This document, known as the "Essex Result,"* furnished the ideas that largely contributed to the defeat of that proposed constitution and led, later, to the calling of the special convention of 1780 to which we have already referred. One of the

* This commonly forgotten document will be found in the "memoir of Theophilus Parsons by his son Prof. Theophilus Parsons.

important parts of the "Essex Result" was an emphatic demand for a bill of rights. After that he rapidly became, and remained until his death, the leader of the bar and one of the leading Federalists in Massachusetts. He seldom went outside of Massachusetts, but we read somewhere the other day a statement of William Pinkney that "he and Theophilus Parsons were the only men in America who had mastered 'Coke on Littleton'."

Parsons was one of those men who had a positive dislike of notoriety and, although he wrote voluminously and left masses of manuscript almost all of which have been lost, he never published over his own name anything except a mathematical discussion, other than the opinions which he wrote later as Chief Justice. He was one of those men who furnished ideas for others without claiming any credit for them.

From the time of the Federal Convention in 1788 until 1806 he was in active practice as the leader of the bar in the State. During this time all jury trials in Massachusetts were conducted before three judges of the Supreme Judicial Court who had to travel about the State, which then included Maine, by carriage or on horseback to hold the sessions. The judges often charged the jury separately and there was an appeal as of right to a second jury. It was obviously a weak, dilatory system and, at the beginning of the nineteenth century, the legislature tried the experiment of providing for jury trials before a single judge. The bar, as usual, when any marked change in practice is attempted, was generally opposed to the new plan. In 1806, when Chief Justice Dana resigned, two of the judges of the Supreme Court who felt strongly that an entirely new man was needed to break in the practice communicated their views to Governor Strong and urged that Parsons should be appointed without notice to him, and, that if this was done, he might be pursuaded to accept the office of Chief Justice. It appears from a statement of Judge Story that the personal income of Parsons at that time was about $10,000, which was a considerable sum in those days. The salary of the Chief Justice was about $1,500. Parsons accepted the appointment and served until his death in 1813. His salary was raised $2,000 during that time.

With him the modern administration of justice in Massachusetts began. Parsons applied the view of Lord Lyndhurst, who said "it was the business of a judge to make it disagreeable for counsel to talk nonsense." He not only waked up the entire bar and began to despatch business in a manner unheard of in those days, but he turned his court literally into a law school, vigorously enforced the rules of pleading of which he was a master, checked the volubility of counsel and created a tremendous disturbance in the courts in consequence. Going on the bench at the age of 56, with all the instincts of an old war horse at the bar, he naturally had to learn something about being a judge at the same time that he was teaching the bar how to try cases promptly.

We have said that he turned his court into a law school. Rules of pleading and practice have always been annoying and mystifying, not only to clients and other laymen, but to a large proportion of the bar, and it is not uncommon to hear well-known, able and successful

lawyers profess not only more or less ignorance, but more or less contempt for a knowledge of pleading and practice. The reason for the lack of knowledge is that they have had to rely upon others in many ways to attend to the details. The reason for the contempt is that the subject happens to bore them and they do not like to appear ill-informed as to important tools of their professional work, so they disparage the tools. All this is very human, for it is human even for men of ability to talk nonsense at times with the air of wisdom.

But in spite of some of the difficulties and some of the excessive technicality in the older systems of pleading, the system of special pleading at common law and its most skillful expositors performed the function, both in England and in this country, of the modern law school; and it was through study with great special pleaders, like Tidd and others, that many of the great English lawyers developed, by having their wits sharpened and their noses held down to the careful analysis of facts for the purpose of presenting in clear and logical sequence the legal results of the different aspects of a case. Probably few readers of "David Copperfield" realize that the "Mr. Tidd," the author of "Tidd's Practice," referred to by "Uriah Heep," was the man who appears to have trained many great English lawyers of the nineteenth century.

As the English bar was trained by pleading and pleaders so the early Massachusetts bar was trained. But in Massachusetts the man who took the place of Tidd and his contemporaries was the Chief Justice of the Supreme Judicial Court.

The following story illustrates the disturbance which Parsons created at the bar in the matter of pleading:

"There was a libel case before the court. It was one of special interest, and a great array of counsel and witnesses were in attendance. The plaintiff, in his anxiety to make a declaration that would stand criticism, filed thirteen counts. * * * The defendant had filed a still larger number of special pleas. But when the case was opened and the papers read, the Chief Justice simply remarked that all the counts and all the pleas were bad, that a trial would be of no use, and advised the plaintiff to withdraw his suit, and the defendant to take no costs,—which was done."

His son continues:

"Let it not be supposed that in all cases of deficient pleading he was harsh or severe. On the contrary, it was his constant habit to assist the lawyers, especially the young ones, in making their pleas. It was no uncommon thing for him, when on a circuit, to take the papers to his rooms and call the young counsel there, point out the defects in the pleadings, show how they might be amended, and illustrate, as fully as he could, the principles involved."

On one occasion Samuel Dexter, who was at one time in the Cabinet, who was the leader of the bar next to Parsons and engaged in many of the most difficult cases, protested at the conduct of the Chief Justice saying, "Your Honor did not argue your own cases in the way you require us to." "Certainly not," answered Parsons, "but that was the judge's fault, not mine."

We have said that Parsons had to learn something about being a judge. He received a lesson on this subject from the same Mr. Dexter, who after being particularly annoyed by the interruptions in his presentation of a case, paused for a considerable time and then took from his pocket a small volume:

"'May it please your Honor,' he said, with great solemnity, 'I will read, with your permission, a few passages from the book which I hold in my hand.' 'What book?' said the Chief Justice, taking his pen to make a note of it. 'My Lord Bacon's "Civil and Moral Essays." I read from the fifty-sixth Essay on Judicature." He then read the passage in which Lord Bacon says, 'Patience and gravity of bearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'."

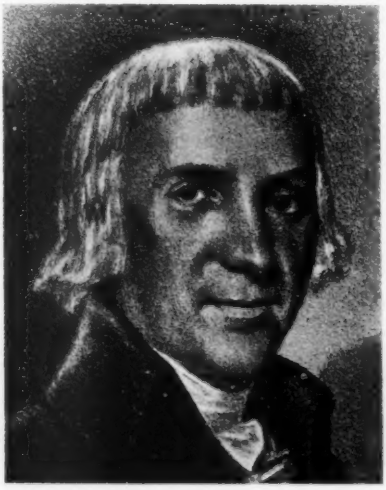
Although his judicial career lasted only six years, in that time Parsons made himself the first great administrator of justice in Massachusetts. It is in no sense of disparagement of the other able judges before or after his time that we speak of him as ranking next to his great successor, Lemuel Shaw, whose career of thirty years as Chief Justice from 1830-1860, as an administrator and as an exponent of the common law had a tremendous influence in stabilizing the government of Massachusetts and keeping it as a common law state. Also as Charles Warren says when American

(Continued on Page 81)

CHIEF JUSTICES 1781-1953

WILLIAM CUSHING
1781-1789 (see p. 63)

NATHANIEL PEASLEE SARGEANT
1789-1791

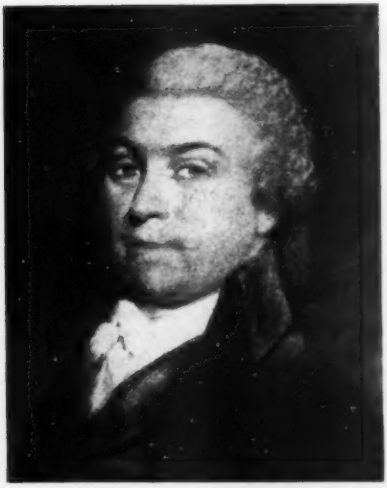


FRANCIS DANA
Justice Supreme Judicial Court, 1785-1791
Chief Justice, 1791-1806
(From a portrait by Sharples in possession of Roland Gray, Esq.)

THEOPHILUS PARSONS

Chief Justice Supreme Judicial Court, 1806-1813

Of this picture by Stuart, the son of the Chief Justice says: "This head was painted from memory, immediately after his death, and was never finished. I regard it as an admirable likeness. Stuart was earnestly requested by my uncle William to finish it; but he always refused to do so, saying that he had *seen* my father for an hour, and painted while the vision lasted, and if he saw him again he would finish it, and not otherwise."

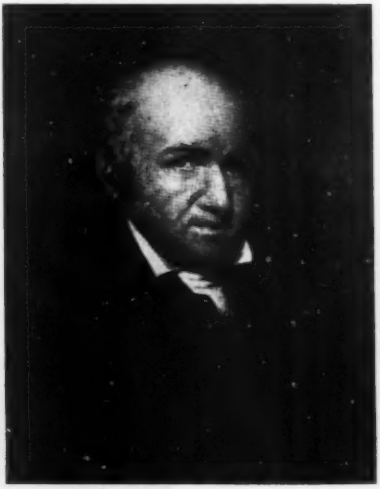


SAMUEL SEWALL

Justice Supreme Judicial Court, 1800-1814

Chief Justice, 1814

(From a portrait by Sharples in the possession of Roland Gray, Esq., of Boston)



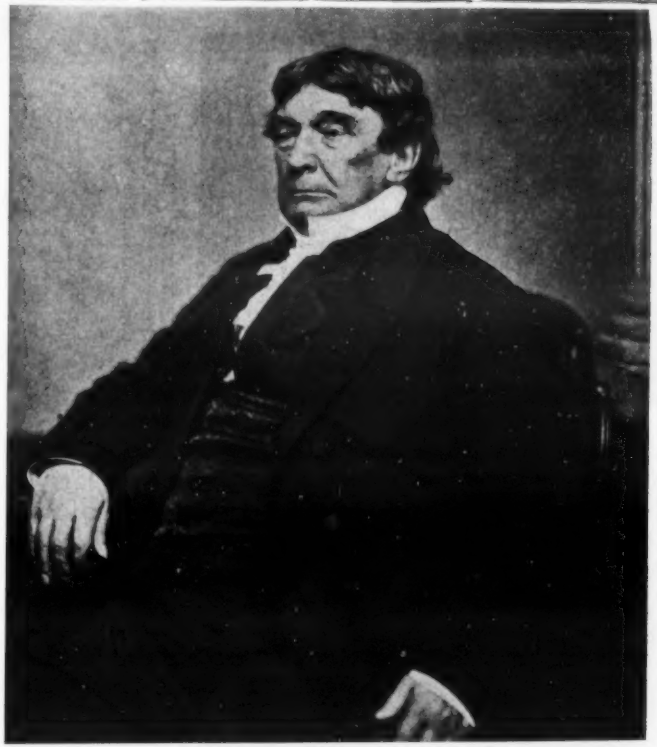
ISAAC PARKER

Justice of the Supreme Judicial Court 1806-1814

Chief Justice, 1814-1830

(From a portrait by Sharples in the possession of Roland Gray, Esq., of Boston)

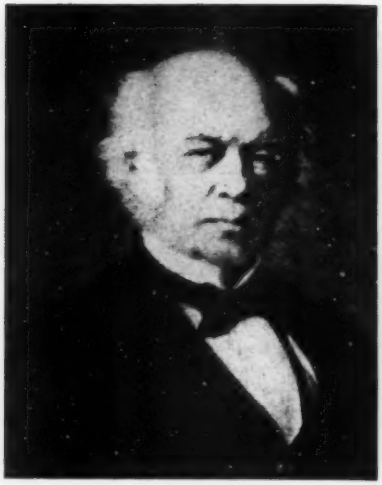
LEMUEL SHAW
Chief Justice Supreme Judicial Court, 1830-1860



CHIEF JUSTICE SHAW

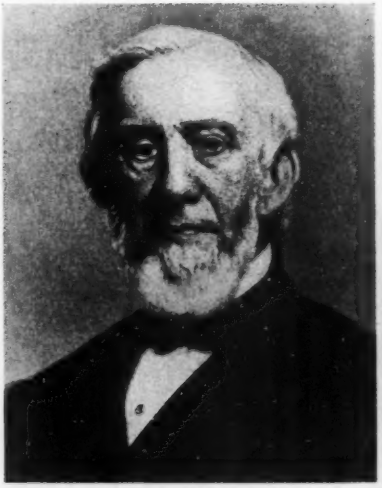
As Dean Pound has said: "The Court was fortunate in being presided over for a generation by one who was not the least of the six outstanding judges of the formative era of our law." (M. L. Q., October, 1942, 17 and Pound "The Lawyer From Antiquity to Modern Times." (1953) 185-6.)

GEORGE T. BIGELOW
Justice Supreme Judicial Court, 1850-1860
Chief Justice, 1860-1868



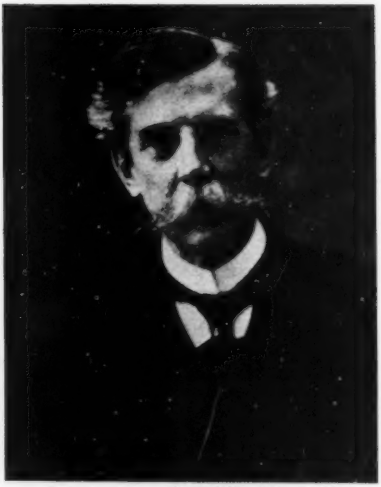
REUBEN A. CHAPMAN
Justice Supreme Judicial Court, 1860-1868
Chief Justice, 1868-1873

HORACE GRAY
Justice Supreme Judicial Court, 1864-1873
Chief Justice, 1873-1882
Justice Supreme Court of the United States, 1882-1902



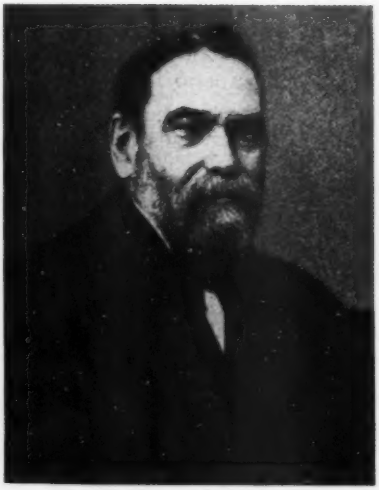
MARCUS MORTON
Justice Supreme Judicial Court, 1869-1882
Chief Justice, 1882-1890

WALBRIDGE A. FIELD
Justice Supreme Judicial Court, 1881-1890
Chief Justice, 1890-1899

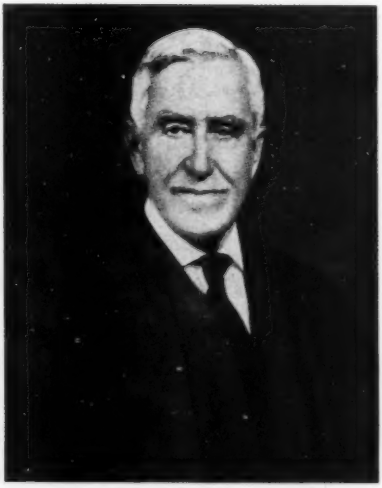


Copyright photo by Notman

OLIVER WENDELL HOLMES
Justice Supreme Judicial Court, 1882-1899
Chief Justice, 1899-1902
Justice Supreme Court of the United States, 1902-1932



MARCUS P. KNOWLTON
Justice Supreme Judicial Court, 1887-1902
Chief Justice, 1902-1911



ARTHUR P. RUGG
Justice Supreme Judicial Court of Massachusetts, 1906-1911
Chief Justice, 1911-1938

FRED TARBELL FIELD
Justice Supreme Judicial Court, 1929-1938
Chief Justice, 1938-1949

THE STORY OF JUDICIAL ROBES

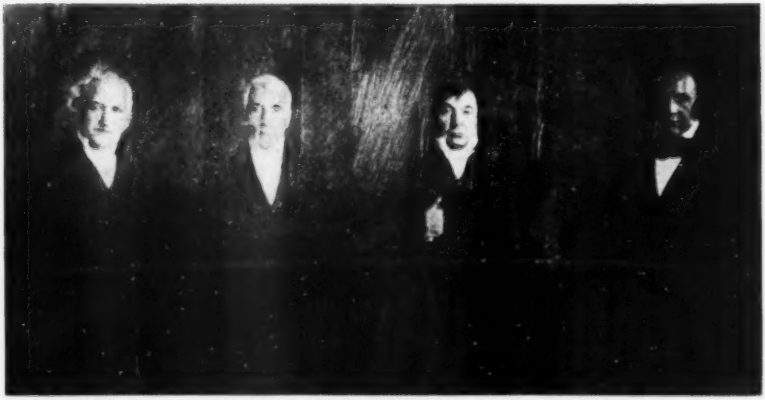
Before, and for a short time after, the Revolution, the bar was classified into barristers and attorneys and beginning about 1761, when Thomas Hutchinson became Chief Justice, both judges and barristers wore wigs and gowns. The story of their disappearance is told in the "History of East Boston" by William H. Sumner in his memoir of his father, Judge (late Governor) Increase Sumner, as follows:

"The use of the robes was discontinued soon after the appointment of Judge Dawes to the bench (1792). The Judge was a man of small stature, of a most amiable and excellent disposition, somewhat of a poet, but had a slight impediment in his speech, which made him lisp. Dana, the Chief Justice, was also of small stature, but had a very impressive and authoritative manner. The Chief Justice took umbrage at this appointment, on account of what he considered the undignified appearance and utterance of Judge Dawes, and alleged that it was not for his qualifications, but by the influence of his father, who was a member of Governor Hancock's Council, that he was appointed. Soon after Judge

Dawes took his seat upon the bench, the Chief Justice came into Court without his robes, while the side Judges had theirs on. Upon retiring to the lobby after the adjournment of the Court, Judge Sumner remonstrated with the Chief Justice against *his* undignified appearance without his robes, and said, 'If you leave yours off, Chief Justice, we shall ours also; but remember what I say, if people get accustomed to seeing the Judges in a common dress, without their robes, the Court will never be able to resume them.' The Chief Justice, with a remark of great asperity, persisted in his determination, and from that period the robes which gave such dignity to the bench, were laid aside."

The Court sat without robes for more than 100 years until March 5, 1901, when, as a result of a petition from leading members of the bar while Holmes was Chief Justice, the present simple black silk robe was adopted.

We understand that the wearing of robes is ridiculed in some states, but there is nothing "undemocratic" about a judicial costume. We expect soldiers and policemen and court officers to be suitably dressed—why not a judge? The late Albert E. Pillsbury, former attorney-general, whose caustic tongue prevented his being governor, was quoted as saying, when the robe was put on again, "It is desirable that the judges should, at least, have the appearance of learning."



HUBBARD, J. WILDE, J. SHAW, C. J. CHARLES A. DEWEY, J.
SUPREME JUDICIAL COURT
1842-1847

(Parsons, Continued from Page 75)

reports began it was fortunate that men of the calibre of Parsons in Massachusetts, Jeremiah Smith in New Hampshire, Chancellor Kent in New York and others in other states, were on the bench.

THE 19th CENTURY BAR

Our story is not intended in any sense as a complacent eulogy of the legal profession. We are fully conscious of the fact that lawyers have as many faults as other people, and are commonly regarded as having more; but it has often been pointed out that the strength of the common law and equity lies in its development through judicial action in the face of a keenly critical bar. That the bar is as important as the bench in the matter is a commonplace of post-prandial and sometimes rather dull professional oratory. It is happily reflected, however, in two utterances of Mr. Justice Holmes, while a member of the Supreme Judicial Court of Massachusetts. In an address of 1885, he referred to "The judges' half of our common work", and continued, "Shall I ask what a Court would be, unaided? The law is made by the bar even more than by the bench."*

A few years later, he responded to the memorial of the Middlesex County Bar on the death of Hon. Daniel S. Richardson of Lowell in 1890. Mr. Richardson was a man (like Col. Hopkins of Worcester and others in all counties) whose life and character in his community took the place of the canons of ethics of today. He was described by Hon. E. R. Hoar in a letter as follows:

> "He practised law, not only according to the injunction of the official oath,—'with all due fidelity to the court as well as to the client,'—but what is harder still to keep always in remembrance, toward the other side."

Of this man, Judge Holmes said:

"As we go down the long line—at every step, as on the Appian Way, a tomb—we can see the little space within which Mason rose, grew mighty, and was no more—or Dexter, or Choate, or Bartlett, or Lord, or Sweetzer; alas! now we must add, or Richardson—and the record which remains of them is but the names of counsel attached to a few cases.

"Is that the only record? I think not. Their true monument is the body of our jurisprudence—that vast cenotaph shaped by the genius of our race and by powers greater than the greatest individual, yet to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole and say to myself, he has done his part to help. . . . I say to myself today that all this wonder is the work of

* "Collected Legal Papers" 25 and compare "Mr. Justice MacCardie" by John Pollock, p. 11.

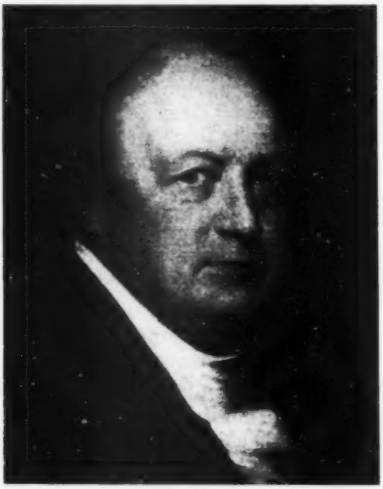
such patient, accurate, keen, just, and fearless spirits as Daniel Richardson."

In one of the chapters in Josiah Quincy's "Figures of the Past," after speaking of the position, character and personal influence of William Sullivan and Harrison Gray Otis at the Suffolk Bar in the early part of the nineteenth century, he says, "Men of the stamp of Sullivan and his friend Otis were more conspicuous for what they were than for what they did." This does not mean that such men do not *do* much. They are *effective* men in their various days and ways. We can all think of such men who are the real representative body of the profession, who inspire public confidence and respect for the bar, regardless of all the cynicism and materialism of their particular generation.

They accept, and live up to their professional responsibilities, as conceived by Chief Justice Parsons of whom his son, Professor Theophilus Parsons, wrote:

> "I believe there was nothing which my father more desired than that the people should cultivate in themselves a kind and respectful, but watchful jealousy of the judicial department; and should feel a deep and sincere, and yet a rational respect for it, founded upon a just understanding of the vast importance of its functions. And that the people might so feel, the very first and most essential cause must be, that the judicial department should *deserve* to be so regarded. He wished that the people should see and know, clearly and certainly, the utility of the judiciary *to them;* and that they should see and know as clearly the means by which their utility might be secured and preserved.
>
> "In this department he included, not the judges only, but all who were officers of the courts; and among them he placed all who practiced at the bar. And I believe that he was earnest and constant in his endeavors to impress upon his students, and upon others who came within his reach, that it was the duty of every lawyer to feel that upon himself rested some portion of the responsibility, and of the power for good or for evil, with which the institutions of a constitutional republic invest its judicial department."*

* Memoir of Theophilus Parsons, 199.



JEREMIAH MASON

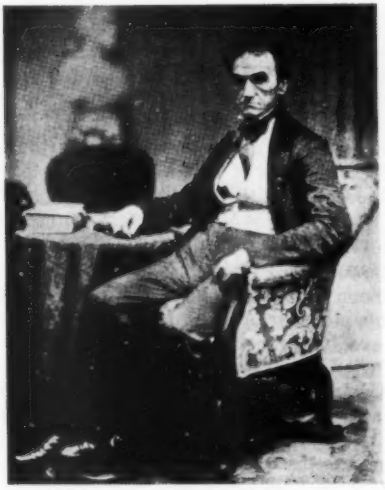
The following passages appear in John C. Gray's account of Jeremiah Mason in "Great American Lawyers."

" 'If you asked me,' once said Daniel Webster, 'who is the greatest lawyer I have known, I should say Chief Justice Marshall, but if you took me by the throat and pushed me to the wall, I should say Jeremiah Mason.'

"And down to the present day, such has continued the reputation in New England of this farmer's son, gigantic in stature (for he stood six feet six), plain, quiet in manner, often homely of speech, but with a vision into the law and facts, a power of clear statement and a force of sarcasm seldom equalled; while his common sense and a knowledge of human nature amounting almost to genius, made him the most successful of advocates and the wisest of counsellors."

Jeremiah Mason was born at Lebanon, Connecticut, in the year 1768. Beginning in New Hampshire, as a young man, he practiced there until 1832, besides serving as United States Senator from 1813 to 1817. In 1816 he declined an offer of the position of Chief Justice of New Hampshire. With Jeremiah Smith he argued the Dartmouth College case in the State Court and laid the foundations of Webster's later argument in Washington.

"In 1832 Mr. Mason established himself in Boston, where he continued in active practice until, in 1838, upon completing his seventieth year, he, in accordance with a resolution formed long before, retired from the courts; but he continued to act as chamber counsel until his death at the age of eighty, in the year 1848."



RUFUS CHOATE

John C. Calhoun, listening to Choate's eloquent appeal in the United States Senate for the use of the bequest of James Smithson to establish a great national library, exclaimed to those near him: "Massachusetts sent us a Webster, but in the name of heaven whom have they sent us now?" Choate was a genius in three ways: in the art of advocacy in court; in the art of public speaking, and in that rare faculty of sustained enthusiastic enjoyment of life which made all his other accomplishments possible. It is in connection with this third aspect of him that we call attention to Dr. Fuess's book entitled "Rufus Choate, the Wizard of the Law." The descriptive part of the title may annoy some lawyers as too "popular." But the book is written for laymen whose interest is likely to be attracted by the word "wizard." As a matter of fact, Choate was probably no more of a "wizard," even with a jury, than Jeremiah Mason and other rare but occasional "wizards" in different generations, but he was a different kind of a "wizard" and therein lies the secret of the continued interest in him.

Most of the information about Choate had appeared in Browne's two volumes of his "Life and Writings" and other books. But here is a single volume for (comparatively) "light" reading for those who like sustained enthusiasm, of a man who, in spite of ill health, constant headaches and other obstacles to enjoyment, could say with

characteristic exaggeration, but with much truth, on a visit to the North Shore:

> "My dear Loring, there has not been a twentieth part of a minute since I entered this terrestrial paradise that I have not enjoyed to the top of my bent; but let me tell you that should you confine me here for a week apart from my work and my books, I know that I should die from utter *ennui*. You are fortunate in being able serenely to delight in it day after day." He confessed on another occasion that if he "were to go to Newburyport for a vacation without his books, he should hang himself before evening."

A striking portrait, here reproduced, shows his quivering energy and enthusiasm in every line.

There have been various estimates of Choate as statesman and otherwise. Some men do not think he was as great as he might have been, etc. There have been "*greater*" men than Choate. There have been men who reached higher levels of moral perfection in the eyes of New England abolitionists whom Choate certainly did not please. But that he was a fascinating creature with great qualities, a man of "infinite variety" one of the greatest of American advocates and an orator of the first rank who could sway the minds and feelings of great audiences with his magnetic eloquence and so saturate his generation with traditions about him that his memory is still fresh, so that he is quoted and read with interest years after his death, when most of his generation of lawyers, with the exception of Webster, are largely forgotten, are facts which withstand all critical moralizing.

Essex County has produced many remarkable men.

"And from Hog Island, in Chebacco [now the town of Essex], appeared Rufus Choate, the strangest, the least explicable, and, with one exception of Hawthorne, the rarest spirit of them all."

He was born on October 1st, 1799.

"Joseph H. Choate, his distant relative, described him as a 'mercurial child of the sun,' and marveled that he should have been nurtured under the chilling blasts of our New England east winds."

"If she had not been obliged to count her pennies so carefully, Miriam Choate might have tried to give her two older boys a year at a school like Phillips Academy, Andover, only a few miles away."

"At nineteen David Choate was a teacher in the district schools, no longer financially a burden on his mother and actually able to contribute to her support. Recognizing Rufus' brilliance, he resolved to sacrifice his own future in order that his brother might have his chance. . . . It was David, then, who, with extraordinary self-effacement, made it possible for Rufus to go to Dartmouth College."

"He had not been in Dartmouth very long before he wrote home 'The situation I most envy is that of a Professor in a College.'

And, when the law was suggested as a possible occupation, he expressed a dislike for 'the tiresome routine of a special pleader's life.' That Choate was persuaded to revise this immature opinion is due mainly to his observation of Webster during the Dartmouth College Case, which was then in its final stages."

"All his life long, moreover, Choate revered Webster, defending him against criticism, helping him in financial difficulties, and standing side by side with him on great national issues."

"The autumn of 1820 found him (Choate) at Cambridge, where he enrolled in the newly-established Harvard Law School.

He visited Washington and there heard William Pinkney argue before the court.

"Pinkney's vehement manner, rapid speech, and powerful eloquence, combined with his logical and accurate judgment, renewed the ambition of Choate, who, in a large degree, took him as a model when he himself began to stand before judges."

He soon attracted attention at the bar and later

"It was not solely as an advocate that Choate's reputation was growing. He had also acquired prestige as a platform orator. In 1833, he prepared with great care a lecture with a formidable title, —'The Importance of Illustrating New England History by a Series of Romances Like the Waverly Novels,'—which he delivered, not only in Salem, but also in other towns in Essex County. The Age of Lyceums was just beginning and Rufus Choate, while never having the leisure for any large number of engagements, was one of the first in that field.

"It was a time when the American eagle sometimes screamed defiantly at the whole world and when the favorite pastime of cross-roads orators was twisting the British lion's tail. Even Choate, who had classical standards of good taste, was guilty, under emotional stress, of sentences which bring a smile to the lips of twentieth century critics."

"In 1856, his most profitable year, he took in more than $22,000. The largest fee accepted by Choate was $2,500,—a sum which he received in only four instances." . . .

"For his own part, he never bothered with accounts. He once planned to start a system of double-entry bookkeeping, actually purchasing the ledger and putting down one item, 'Office debtor one gallon of oil.' This however, was the sole entry that was ever made. It was only during his last decade, when his partner watched over his finances, that Choate knew from day to day where he stood."

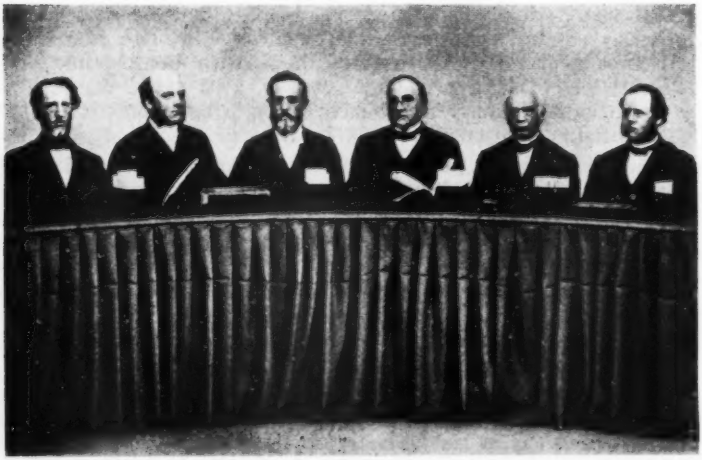
"In his heart Choate had a lofty ideal of the judiciary, and his confidence in their decision was rarely shattered. When, in a famous trial, one of his junior counsel was rising to contest what seemed to him to be an unfair ruling by Justice Shaw, Choate drew him back saying, 'Let it go. Sit down. Life, liberty, and property are always safe in his hands.' "

He declined a professorship in the Harvard Law School and also declined a seat on the Supreme Bench of the Commonwealth. In September, 1851, Webster wrote President Filmore suggesting Choate as Justice of the Supreme Court of the United States, but adding that Choate would not serve. Choate himself corroborated Webster's statement.

"In 1853, Choate accepted appointment as Attorney General of the Commonwealth, an office which he accepted mainly because it enabled him to avoid being retained in cases arising from the liquor law of 1852. It has been said that he found so many details of the position distasteful and irksome that he was glad to retire at the end of his term."

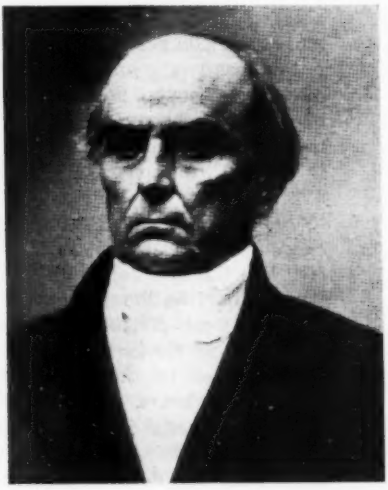
Our literature is poorer from the loss of Choate's lecture on "The Romance of the Sea" which was stolen from his pocket in New York. "It was said by one who heard it that 'He seemed full of his wild subject and swayed his audience with eloquence, as the storm sways the sea.' "

Great advocates understand better than most men the value and importance of having men on the bench who are mentally and morally able to resist them and keep the balance in the interests of Justice. Choate's speech on "Judicial Tenure" in the Constitutional Convention of 1853 was described by Joseph H. Choate of New York as "the greatest single service which he (Rufus) ever rendered to the profession and to the Commonwealth of which he was so proud."



Wells, J.; Gray, J.; Hoar, J.; Bigelow, C. J.; Chapman, J.; Foster, J.
The Supreme Judicial Court
1866-1868

DANIEL WEBSTER in 1825
(From a portrait by Francis Alexander)



DANIEL WEBSTER in 1851
(From a daguerreotype)

Address of Samuel P. Sears at the Anniversary of Webster's Death, Marshfield, October, 1952

As President of the Massachusetts Bar Association it is an honor and a privilege to have the opportunity before this impressive assemblage to express a brief appreciation of one of the greatest lawyers not only of New Hampshire and later of Massachusetts, but of America. So much has been written about him by historians, biographers, essayists, admirers and critics, that on an occasion such as this one's most appropriate contribution seems to be a reminder of certain facts and comments which arrest attention and suggest the great qualities of the man.

Edward Everett said of him in 1852:

> "Whoever in after times shall write the history of the United States for the last forty years will write the life of Daniel Webster."

And Senator William H. Seward (later Secretary of State in Lincoln's Cabinet) said in his remarks, in the Senate:

> "Whatever else concerning him has been controverted by anybody, the fifty thousand lawyers of the United States conceded him an unapproachable supremacy at the bar."

Why did they say such things? What did they mean?

In order to understand Webster, his position at the bar and his influence in the nation, aside from his native ability and emotional power when his constitutional convictions—solid as New Hamp-

shire granite—were involved, we must throw ourselves back for more than 100 years to the first half of the 19th Century when the nation was young and still learning with difficulty the nature of its own government. We must try to visualize conditions with which many of us are unfamiliar today. *First,* we must remember his native environment,—born and bred on a New Hampshire farm in a rural atmosphere with simple people whom he respected and never forgot, and sent to Dartmouth College with funds raised by his father by mortgaging the farm, Webster had to justify that. *Second,* his association, as friends and adversaries at the bar, with men like the first Jeremiah Smith and Jeremiah Mason, older than Webster and both really great lawyers of their day. *Third,* and, perhaps, most difficult for many of us to understand today, the American people in the days of Webster and Rufus Choate were so interested in their government that they liked to listen to speeches for hours, or read and think about them to an extent that seems impossible in these distracting days of baseball, movies, radio, television, golf and other diversions in a changing world. They were the days of eloquence by masters of the English language—a taste that is rarely appealed to or satisfied today.

Referring again to Jeremiah Mason, Edwin P. Whipple, in an introductory essay to a volume of "Webster's Great Speeches", published in the 70's, refers to Webster's "constant collision" in the courts of New Hampshire with Jeremiah Mason, saying:

> "It has been said that Mr. Mason educated Webster into a lawyer by opposing him. He did more than this; he cured Webster of all the florid foolery of his early rhetorical style. Of all men that ever appeared before a jury, Mason was the most pitiless realist, the most terrible enemy of what is—in a slang term as vile almost as itself—called 'Hifalutin'; and woe to the opposing lawyer who indulged in it! He relentlessly pricked all rhetorical bubbles," . . . "he talked to them in a plain, controversial way, in short sentences, and using no word that was not level to the comprehension of the least educated man on the panel. 'This led me', he (Webster) adds, "to examine my own style, and I set about reforming it altogether'. ". . . Webster, without ever becoming so supremely plain and simple in stye as Mason, still strove to emulate, in his legal statements and arguments, the homely, robust common-sense of his antagonist; but, wherever the case allowed of it, he brought into the discussion an element of *un*-common sense, the gift of his own genius and individuality, which Mason could hardly comprehend sufficiently to controvert, but which was surely not without its effect in deciding the verdict of juries."

I need hardly mention to you the Dartmouth College case which placed him among the foremost advocates in the country at the age of 36, or his famous reply to Hayne a few years later which started him as the leading statesman and orator for the next 20 years until his death in 1852.

At the turn of the century about fifty years after Webster's death, when the storms of controversy, criticism and abuse which broke over his head had subsided, one of our most balanced historians, the late James Ford Rhodes, wrote his "History of the United States" and said:

> "The distinctive virtue of Webster was his patriotism. He loved his country as few men have loved it; he had a profound reverence for the Constitution and its makers—and he was deeply in earnest when he gave utterance to the sentiment: 'I was bred, indeed, I might almost say I was born, in admiration of our political institutions'. Webster's great work was to inspire the country with a strong and enduring national feeling, and he impressed upon the people . . . a sacred love for the Union. How well his life-work was done was seen less than nine years after he died, in the zealous appeal to arms for the defense of the nation."

In describing one source of his influence Mr. Whipple said:

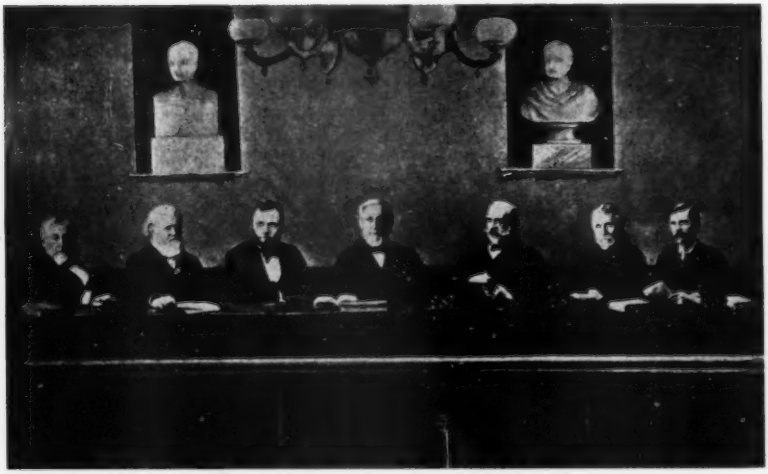
> "With all his great superiority to average men in force and breadth of mind, he had a genuine respect for the intellect, as well as for the manhood, of average men. . . . The greatest statesman of the country frankly addressed them, as man to man, without pluming himself on his exceptional talents and accomplishments. Up to the crisis of 1850, he succeeded in domesticating himself at most of the pious, moral, and intelligent firesides of New England. Through his speeches he seemed to be almost bodily present whenever the family, gathered in the evening, . . . discussed the questions of the day. It was not the great Mr. Webster, 'the godlike Daniel', who had a seat by the fire. It was a person who talked *to* them, and argued *with* them. . . . That Webster was thus a kind of invisible presence in thousands of homes where his face was never seen, shows that his rhetoric had caught an element of power from his early recollections of the independent, hard-headed farmers whom he met when a boy in his father's house."

As a lawyer before a jury, probably his greatest, most difficult and successful argument was in the criminal case tried before the Supreme Court of Massachusetts in 1830 in which he appeared as special prosecutor for the Government. At that time under the common law an accessory could not be convicted until after

the principal had been convicted. One Crowninshield and two Knapp brothers were in a conspiracy to murder Captain White in Salem. Crowninshield did the actual killing and then hung himself before trial. Webster succeeded in convicting the two Knapps as the principals, although they were outside of the house at the time of the murder. Webster's argument when read today is as impressive as it must have been when he addressed the jury.

Also, simply as a lawyer, he appeared as counsel in many of the great constitutional cases before the Supreme Court of the United States and, by his arguments, assisted the Court in the early development of our Constitutional law.

In these various ways he became one of the greatest builders of our strong constitutional nation by helping American citizens to understand and respect their government so that it existed in their minds and hearts as well as on paper. In these days when many people neglect or forget history and underestimate great men who contributed to it, you do well to honor the memory of one of the greatest.



Colburn J., Wm. Allen, J., Field, J., Morton, C. J., Devens, J., Chas. Allen, J, Holmes, J.

SUPREME JUDICIAL COURT
1882-1885

BENJAMIN R. CURTIS AND THE IMPEACHMENT TRIAL OF PRESIDENT JOHNSON IN 1868

BENJAMIN ROBBINS CURTIS
Chairman of the Commission on the Massachusetts Practice Act of 1851 which simplified Common Law Pleading
Justice of the United States Supreme Court, 1851-1858

The work of Curtis on the Practice Act is referred to elsewhere. His work on the Court and his dissent in the Dred Scott Case are well known; but otherwise the bar to-day is probably vaguely, if at all, conscious of him.

Everyone is familiar with that professional obituary eloquence which illustrates the friendly art of exaggeration, but here was a man who set professional standards of character, capacity, effort and accomplishment. Some of the things said about him by men of distinction are arresting. For instance, in an address before the Iowa Bar Mr. Justice Samuel Miller of the Supreme Court of the United States, described Curtis's place in his profession in these words:

"In this sense I pronounce Benjamin R. Curtis the first lawyer of America, of the past or present time. I do not speak of him as an advocate, alone or specially, nor as a counsellor; I speak of him as a lawyer in full practice in all the courts of the country, as engaged in a practice which embraced a greater variety of questions of law and of fact than is often to be found in one man's experience."

This is strong language, not of local pride, but from a distant state at a time when large offices and stenographers and telephones and all the present helps of modern business were unknown. Web-

ster said: "In clearness, he has probably never been surpassed at the bar." If one reads enough (and it does not require much) about the critical period between 1865 and 1868, to visualize the dramatic crisis with which the Federal Government was faced in 1868, and then reads the answer to the impeachment charges which was prepared for the President by Curtis, working, it is said, for thirty consecutive hours without rest or sleep, the force of Webster's remark appears.

That impeachment trial was a vertible Thermopylae for the government of the United States with the pass held by Curtis supported by his four associated counsel, twelve Democratic and seven Republican senators, twenty-two men in all. As Garfield, then in Congress, characterised the situation, many persons in Washington were doing extravagent things to prove themselves radicals; he was trying ". . . to be radical without being a fool," by the looks of things "no small difficulty."

The team play of the counsel for the President seems to have been perfect, Evarts with his wit, Stanbery, Nelson and Groesbeck with their earnestness born of personal knowledge of the President. But the turning point of the trial seems to have been at the opening, when the clear intellect and the impressive character and bearing of Benjamin R. Curtis set the tone of the defence of the President in answer to the opening by Benjamin F. Butler for the impeachment managers.

After reading various accounts of the trial and of the ordeals to which the seven Republican senators, and particularly Senator Ross of Kansas, were subjected, and then reading over the opening of Butler for the managers and the opening of Curtis for the defence, we think the really controlling issue in their minds was the constitutional nature of their position as judges. Butler opened with a specious argument that the Senate was not sitting as a court, but merely as a Senate conducting, not a trial, but "an inquest of office" with "none of the attributes of a judicial court as they are commonly received and understood." Curtis answered that argument with impressive clarity of statement in his opening sentence when he said:

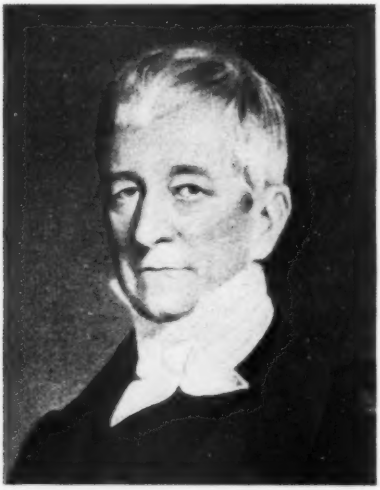
"Mr. Chief Justice, I am here to speak to the Senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the Chief Justice of the United States, for the trial of the President of the United States. This statement sufficiently characterizes what I have to say. Here party spirit, political schemes, foregone conclusions, outrageous biases can have not fit operation. The Constitution requires that there should be a 'trial' " . . .

There was no foundation for the impeachment, but the court was politically packed and the impeachment was lost by only one vote. Perhaps Massachusetts has never been more impressively represented in Washington than in that argument when one of her sons successfully defended the nation against itself in the rancorous attack led in the main by five other sons of New England.*

* Thaddeus Stevens was born in Vermont.

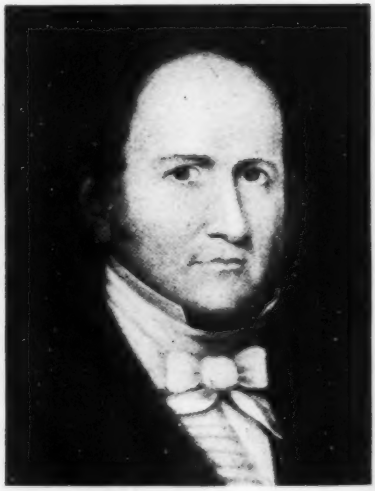
MOORFIELD STOREY
(From a drawing by John S. Sargent)
President, Boston Bar Association 1909-13
President, Boston Bar Association
President, Massachusetts Bar Association 1913-14

THE COMMISSION ON THE REVISED STATUTES OF 1836 AND THE RISE AND THE FALL OF THE "CODIFICATION" MOVEMENT



Chairman, CHARLES JACKSON
Justice Supreme Judicial Court 1813-1823

JOHN PICKERING



ASAHEL STEARNS

Massachusetts is still a common law jurisdiction, but in the discussion of the subject of general codification of the common law at the meeting of the American Bar Association in 1886, David Dudley Field, for many years the persistent leader of the codification idea in America, said:

"Much of the agitation we have had about codes had its origin in Massachusetts."

Many of us may not be aware of our connection with the rise and fall of the idea of codification in Massachusetts and its subsequent fate elsewhere, when the late James C. Carter led the opposition to Mr. Field's code and succeeded in blocking the movement throughout the country. In the "North American Review" for January, 1827, a writer predicted a "legal feud."

THE ATTITUDE OF EUROPEAN JURISTS OF THE 18TH CENTURY

In Dean Pound's article on "The Place of Judge Story in the Making of America Law," printed in 1 M.L.Q. No. 3 in 1916, he refers to the "inclination toward French law" in this country. "Men's minds had been fascinated by the Code Napoleon and in New York, especially, as far back as 1809 we meet with more or less clamor for a civil code on French lines. . . . The (European) jurists of the eighteenth century conceived it to be their task to discover the first principles of law inherent in nature, to deduce a system from them, and thus to furnish the legislator a model code, the judge a touchstone of sound law and the citizen an infallible guide to conduct. They had no doubt that a complete code was possible which once for all should provide in advance the one right decision for every possible controversy. Lay discussions of American law in the first quarter of the nineteenth century abound in demands for an American Code."

THE STORY OF THE CONTROVERSY IN MASSACHUSETTS

Governor Elbridge Gerry agitated the subject somewhat in a special message to the legislature of February 27, 1812, on the law of libel.

Dane's abridgment did not begin to appear until 1823. There had been various compilations, but no adequate consolidated revision of the Massachusetts statutes. Judge Story's books did not begin to appear until 1832. The "sources of law" were not accessible.

In the "American Jurist," beginning with the first number in 1829, there was constant discussion of codification of law in general. A commission was appointed in 1832 to prepare the first general revision of the Massachusetts statutes. The commissioners, who were appointed by Governor Levi Lincoln, were Hon. Charles Jackson, Asahel Stearns, and George Ashmun. Ashmun died before the report and was succeeded by John Pickering, a pronounced opponent of codification. The resolve under which they were appointed was sufficiently broad to allow the commissioners to report a codification of the common law as well as a revision of the statute law, if they saw fit to do so, and it was probably the hope of some

enthusiasts that they would do so, but in the introduction to their report of December 31, 1834, they refrained on the ground "that the questionable utility of putting into the form of a positive and unbending text, numerous principles of the common law, which are definitely settled and well known, was not sufficient to outweigh the advantages of leaving them to be applied, by the Courts, as principles of common law, whenever the occurrence of cases should require it."

This first revision of the statutes was so well done that it met with the general approval of the Bar.

Governor Edward Everett referred to the subject in 1835.

A committee of the legislature after pondering upon the subject for about three weeks, reported on January 29, 1836, that they favored "a code to be added to the revised statutes and constitute a part thereof," to be prepared under a resolve for the appointment of commissioners "well acquainted with our constitutions and the nature of popular government, learned in the law, but unprejudiced in the favor of the common law as it now exists," and they closed their report with the following rather sanguine expression of their expectations, which suggests that the committee were endeavoring, however unsuccessfully, to emulate Governor Everett's style of oratory. They said:

> "It is believed that if this great law reform can be accomplished, it will be regarded as the commencement of a new era in the history of our government. A beginning will then be fairly made of a republican kind of jurisprudence, and the people for the first time will have it in their power to boast of living under laws made by themselves through their representatives. As no law would then exist except the Constitution of the United States, the constitution of this Commonwealth, and the revised code, it would be easy for the people to acquire a general knowledge thereof . . .
>
> "The constitutions and the laws would then form a volume or two, written in concise, chaste, and elegant language, fit to be introduced into our common schools, and constitute the book of reading and study for the highest class. So that while our children shall be acquiring the rudiments of an English Education, . . . they may at the some time be acquiring a knowledge of our forms of government, constitutions, and laws. Liberty and popular government will then be placed on the broad foundation of knowledge and virtue, and the superstructure will be adorned and perfected from age to age, exciting the admiration and imitation of the world." (House Doc. 17 of 1836.)

People had their silly seasons then as now.

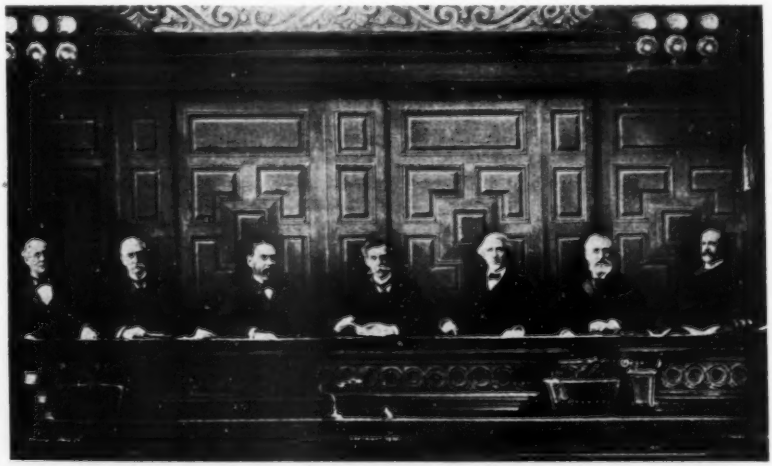
The result of this situation was the passage of another resolve for the appointment by the Governor of a special commission of five "to take into consideration the practicability and expediency of reducing to a written and systematic code the common law of Massachusetts, or any part thereof," and the men whom Governor Everett appointed to this commission included Judge Story.

Meanwhile Judge Story's books were appearing and in 1830 Lemuel Shaw was appointed Chief Justice by Governor Levi Lincoln and began his thirty years of exposition of the law—the opinions being by that time published in advance parts. The Revised Statutes (with the Commissioners' notes, still an important source book), Story's books and the opinions of Shaw and his able associates had made the law more accessible. The agitation, having resulted in a successful revision of the statutes subsided in Massachusetts, to be revived in New York and vigorously pushed by Mr. Field for the rest of his life, only to be defeated in the form in which he presented it, largely by the efforts of James C. Carter.

THE PRACTICE ACT OF 1851

Judge Colby in his "Practice" book of 1848 said in his preface "The system of practice in Massachusetts . . . is probably the most beautiful and simple system that now exists in the world." Others did not agree and Benjamin R. Curtis led a movement and was appointed Chairman of a Commission which reported the "Practice Act" (simplifying but not abolishing common law pleadings) still the basis of Massachusetts practice.*

* In 1851, the Commissioners (Benjamin R. Curtis, Nathaniel J. Lord, and Reuben A. Chapman) expressed their views in opposition to codification in general.



Hammond, J., Lathrop, J., Knowlton, J., Holmes, C.J., Morton, J., Barker, J., Loring, J.

SUPREME JUDICIAL COURT
1899-1902

(John Adams, Continued from Page 61)

ADAMS AND JUDICIAL SELECTION AND TENURE

Years ago, at some bar meeting, a lawyer from some state told us "We have tried all methods in our state and they are all bad." That seems a somewhat unbalanced judgment. Subservient judges under the stuart kings in the 17th century culminating in the "Bloody Jeffries," led to a reaction after 1788 which resulted in the Act of Settlement of 1701 providing for tenure "during good behavior." The first great judge to serve under it, instead of "during the pleasure" of the Crown, was Sir John Holt, Chief Justice of the King's Bench, who became the model of independent judicial character here, as well as in England. In 1775 John Adams was engaged in a newspaper controversy with Gen. Brattle about judicial independence, which was interrupted by the Battle of Lexington and Concord. Adams pointed out that the Act of Settlement did not extend to the colonies. In 1779 Adams drafted the constitutional provisions for selection and tenure adopted in 1780 (printed on page 30). All Massachusetts judges have been appointed and served under them ever since. Massachusetts has always resisted the movement for an elective bench for specified terms of years, thus following the farewell advice of Chief Justice Shaw* and Rufus Choate's speech in 1853, but that does not mean that judges are appointed "for life." It is not quibbling to say that "during good behavior" means exactly what it says. It is as much a "term" as a specified period of years and can be and has been terminated by removal as specified in the Constitution, although not often. It is sometimes overlooked that an elective system of selection prevents the people, without them knowing it, from having on the bench those men with exceptional judicial qualities, whose habits, training, tastes or interests are such as not only to make them poor candidates for a popular election but prevent them from consenting to be candidates at all.

It seems abundantly clear that Chief Justice Parsons, Chief Justice Shaw, and Chief Justice Holmes would never have appeared on the bench under an elective system. The list could be enlarged, but these three seem sufficient examples. Of course, no human system is perfect, but these examples and the faces of the judges portrayed herein are strong evidence in support of our constitutional provisions of 173 years because they suggest that those provisions have worked, in the words of the 29th article of our Bill of Rights, as well "as the lot of humanity will admit."

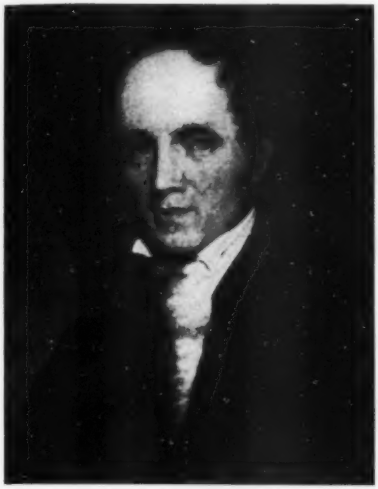
ADAMS AS A CHOOSER OF MEN

While it may at first seem unnecessary, yet in view of the common haziness of ideas which we have noticed, even among lawyers, we

(Continued on Page 114)

* See Chase's "Lemuel Shaw, Chief Justice", 188 and Mass. Law Quarterly for 1922.

THE FATHERS OF PROBATION AS AN ORTHODOX COMMON LAW PRACTICE BEFORE THE STATUTES, AS PART OF THE "EQUITABLE" DEVELOPMENT OF THE CRIMINAL LAW



PETER OXENBRIDGE THACHER
Judge of the Municipal Court of Boston
1823-1843

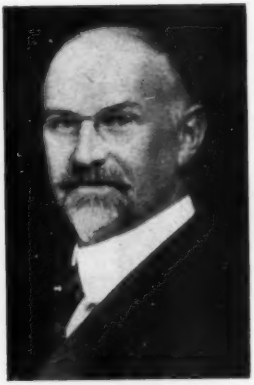
JOHN AUGUSTUS

Judge Thacher, still an authority on the criminal law (See Thacher's Criminal Cases), developed the practice of probation in Massachusetts by judicial action forty years, or more, before there was any statute on the subject. (See "Probation as an Orthodox Common Law Practice," 2 *Mass. Law Quart.*, August, 1917, 591. and 32 Journal of Criminal Law and Criminology No. 1, 1941), Judge Thacher used an occasional friendly sheriff as a probation officer. In 1841, John Augustus appeared in the Boston Court as a volunteer and for the next twenty years acted as a voluntary unpaid probation officer for about two thousand persons. In 1941 the National Probate Association placed a tablet in his memory on the front of City Hall Annex—the site of the old Court House—bearing the inscription:

"JOHN AUGUSTUS

"Moved by the plight of the unfortunate in the jails and prisons of his day a humble Boston shoemaker began a great movement in the reformation of offenders when in 1841 he took from the court for a period of probation one who under his care and with his friendship became a man again. This tablet marking the centenary of probation is inscribed to his memory by those who follow in his footsteps."

As explained in the article referred to above, the Supreme Court of the United States in 1917, in ex Parte United States Petitioner 242 U.S., unfortunately ignored the common law practice of 60 years of the Federal Court in the First Circuit based on the state practice and overlooked the fact that it differed from the practice in some other Federal Circuits which was not within the range of the common law. It is interesting that in the same year (1841) that John Augustus began his work, probation also began in Birmingham in England.



GEORGE R. NUTTER
of Boston

HON. HENRY N. SHELDON
Chairman,
Justice Superior Court
1894—1905
Justice Supreme Judicial
Court—1905-1915

ADDISON L. GREEN
of Holyoke

THE MASSACHUSETTS JUDICATURE COMMISSION
1919-1921

The handbook of the National Conference of Judicial Councils contains a preface by Hon. James W. McClendon, Chief Justice of the Court of Civil Appeals of Texas, Chairman of the National Conference, from which the following passages are quoted:

After referring to the address of Dean Pound on "The Causes of Popular Dissatisfaction With the Administration of Justice", in 1906, Judge McClendon continued:

"Some seven years later the American Judicature Society was born, having for its general objective improvement of judicial administration. That organization has from time to time sponsored important expedients and methods designed to effectuate this objective. Among these was the judicial council—an official body charged with the duty of continuous study of the judicial system and its functioning, and the devising of methods for the improvement of the system and its adaptation to present-day needs.

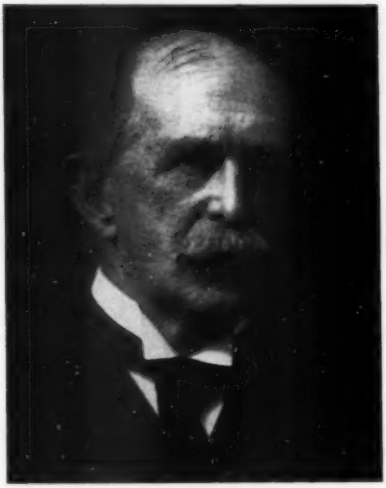
"Probably the first organization of this character was the Board of Circuit Justices set up in Wisconsin in 1913. . . . A similar body was authorized in New Jersey in 1915. It was not, however, until the comprehensive final report of the Massachusetts Judicature Commission in 1921, recommending creation of a judicial council in that state, that the movement attained concerted semblance."

SMALL CLAIMS PROCEDURE

Following the appearance of R. H. Smith's "Justice and the Poor", on recommendation of the Judicature Commission in 1920 in formal procedure for claims up to $35. (since raised to $50.00) was given to all District Courts. About 40,000 cases annually are brought under this procedure.

THE JUDICIAL COUNCIL OF MASSACHUSETTS

Created by Statute in 1924, its first chairman was Hon. William Caleb Loring, a former justice of the Supreme Judicial Court from 1899-1919.



WILLIAM CALEB LORING
Chairman, Judicial Council, 1924—1926

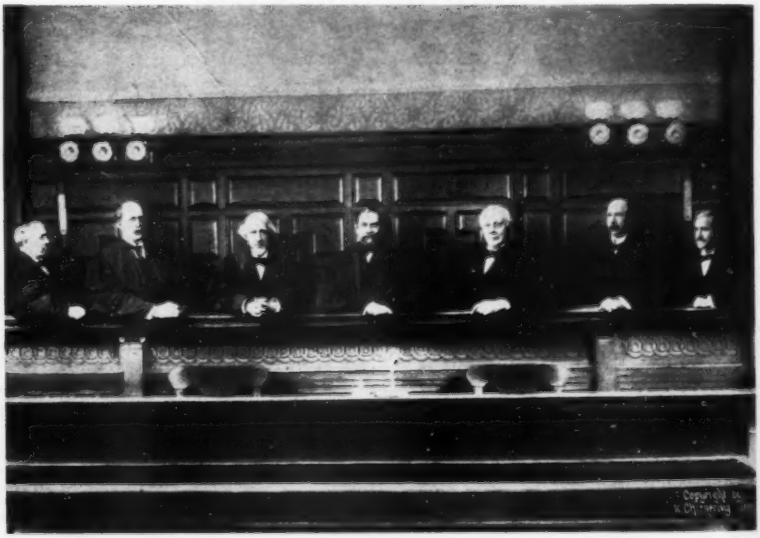
Drafted by Chief Justice Rugg, he was chosen chairman by the Council and served actively for two years against the doctor's advice, going to bed to rest after every by-weekly meeting. At a meeting of the bar when his service began he described it as "a high adventure' and set the pace thereafter. Since then about 150 statutes have been passed following recommendations of the Council. They are listed with references to the reasons in the 27th report in 1951 which also contains an index to the first 27 reports.

The second chairman, from 1926 to 1929, was Addison L. Green of Holyoke, a member from 1924, whose picture appears as a member of the Judicature Commission.

The third chairman was Thomas Hovey Gage of Worcester from 1930 to 1937, and the fourth and present chairman, since 1938, Hon. Frank J. Donahue, a justice of the Superior Court since 1932.

THOMAS HOVEY GAGE
Chairman, Judicial Council
1930-1938

FRANK J. DONAHUE
Justice, Superior Court 1932—
Chairman, Judicial Council 1938—



Sheldon, J., Loring, J., Morton, J., Knowlton, C.J., Hammond, J., Braley, J., Rugg, J.

SUPREME JUDICIAL COURT
1906-1911

BAR ASSOCIATIONS

Prior to 1836 the bar was classified into counsellors and attorneys (similar to the English barristers and solicitors). There were associations from time to time, but they faded away until the seventies when the Boston Bar Association* and various associations in other counties began to emerge. The Massachusetts Bar Association was organized in 1909. The Law Society of Massachusetts organized in the late twenties was an active organization for twenty years until it merged with the Massachusetts Association in 1950 during the presidency of Mr. Sears.

We could tell the story of the active interest and services to the profession of the various presidents since 1909** who did much more for the profession than is generally known in the face of the common apathy of the bar and later economic conditions, but space will not permit.

MAYO ADAMS SHATTUCK

Hon. Richard Olney, the first president from 1909-1910 with the assistance of the other organizers brought the Association into being. Thirty-one years later Mayo Shattuck served for three years from 1941-1944 and saved it from drowning when, owing to the depression of the thirties, the membership had dwindled from 1250 in 1929 to between six and seven hundred in 1941. Under his successors, Edward O. Proctor, Hon. Louis S. Cox, Richard Wait and Samuel P. Sears, the membership gradually increased to the present approximate number of 4500.

The turning point came with the discussion of the plan for bar "integration" similar to those of some other states. This subject had been publicized for discussion in the "Quarterly" and in the "Bar Bulletin" for about 10 years until 1941 when there was an active discussion which stimulated interest in bar organization. As a result Shattuck was elected president about a month after he became a member of the Association. Being a man of dynamic

---

* Reference has been made herein to the 75th Anniversary of the active service of the Boston Bar Association, an account of which appears in the "Bar Bulletin" issued on that occasion in February, 1952.

** Their names are listed on p. 2.

interest and energy he began to bring the bar throughout the Commonwealth together by establishing the annual lawyer's institutes and generally stimulated wide interest.

MAYO ADAMS SHATTUCK

A man of marked ability in active practice in Boston, an author and lecturer on "trusts," known throughout the nation, a member for years of the Board of Bar Examiners, he gave himself to the work without reserve as he did later as president of the Massachusetts Civic League when he was not well. Working, and overworking to the end he died in the fall of 1952. The profession and the community lost a whole-hearted disciple of stimulating public service, many of us lost a friend, and his successors have carried on. Mayo, we salute you!

THE SUPERIOR COURT

In 1859, a joint special committee of the legislature was appointed to consider the courts. At the beginning of their report (House Document 120 of 1859), they described the then existing system as follows:

> "The plan upon which our courts are now organized was established in 1820. The Commonwealth then contained but five hundred and twenty-three thousand two hundred and eighty-seven inhabitants. The theory of the courts then was, that any party was of right entitled to two trials by jury of all questions of fact in all important cases, civil, as well as criminal. The first was in the court of common pleas; either party could then appeal for another trial in the supreme judicial court. This system of trials stood till the year 1840, when Governor Morton went from the bench to the chair of the executive. In his long judicial life, he had seen the mischievous fruits of this system, in its delays and expenses. Upon his recommendation, the legislature of that year took away all right of appeal on questions of fact, and defined the jurisdiction of the two courts."

The legislative committee of 1859, above referred to, then made a new starting point by recommending the abolition of the Superior Court for Suffolk County and the Court of Common Pleas throughout the rest of the state and the creation of a Superior Court for the whole Commonwealth. This recommendation was followed and the present Superior Court came into existence. It was given concurrent jurisdiction in equity with the Supreme Judicial Court in 1883 and in order to relieve that court because of its constantly increasing appellate work, jurisdiction of libels for divorce and petitions for nullity of marriage was transferred to the Superior Court in 1887* and capital cases in 1891, so that it is the great trial court of the Commonwealth.

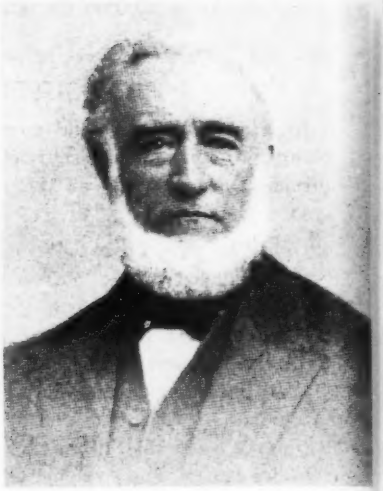
When the Court was created in 1859 it consisted of ten judges, including the Chief Justice. With the increase of work for the Court the number of judges has been increased and there are now thirty-two judges, including the Chief Justice.

The chief justices appear on the following pages.

---

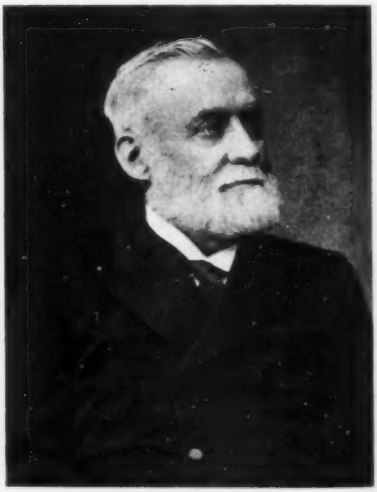
* Now the Probate Courts have concurrent jurisdiction.

CHARLES ALLEN
Chief Justice
1859-1867



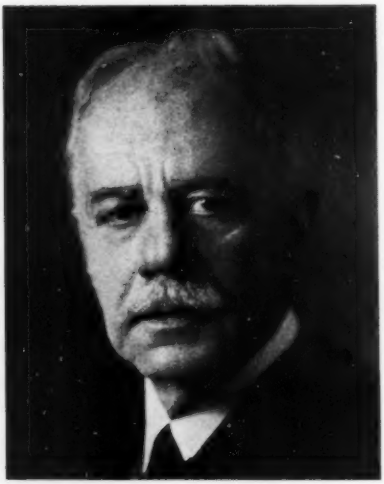
SETH AMES
Chief Justice 1867-1869
Justice Supreme Judicial Court 1869-1881

LINCOLN FLAGG BRIGHAM
Chief Justice Superior Court, 1869-1890



ALBERT MASON
Chief Justice Superior Court, 1890-1905

JOHN ADAMS AIKEN
Chief Justice 1905-1922

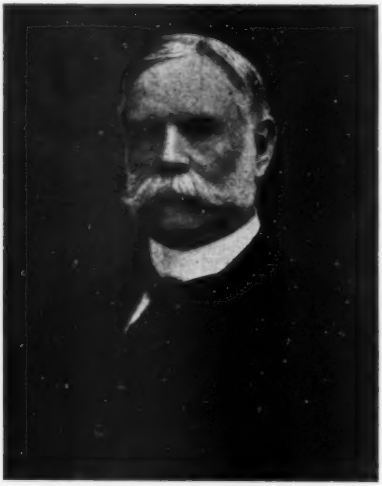


WALTER PERLEY HALL
Chief Justice 1922-1937

JOHN P. HIGGINS
Chief Justice 1937-

TWO LEGAL ARCHITECTS

Alfred Hemenway and Charles Thornton Davis

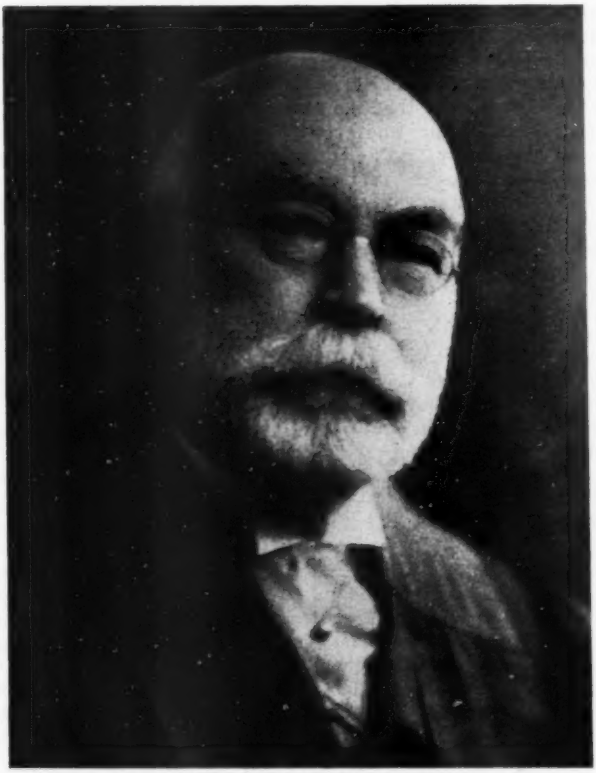


ALFRED HEMENWAY

In 1891 Governor William E. Russell urged the study of land registration suggested by the Australian System of Sir Robert Torrens. A Special Commission was appointed and disagreed.

After a lapse of several years a new commission was appointed by Governor Wolcott in 1897—this time consisting of one man. That man was probably the best qualified man in the Commonwealth for the task—Alfred Hemenway who, as was commonly known, was slated for appointment to the Supreme Court of the United States by President McKinley at the time of the President's death.

Hemenway reported an act without a word of explanation except the act itself. It provided for a Hemenway system, rather than a Torrens system, as an optional method of establishing titles. The act, substantially as reported, was passed and the court came into existence in 1898. The only recorded comment by Hemenway on his own work appears in the last address to the Bar by Judge Davis at the meeting of the American Bar Association at Boston in 1936, about a month before his death. He quoted Hemenway as saving that he had worked out the act "along purely common law ideas." He then said to Davis, "This court is something or nothing. I don't know which it is. It can be nothing. It is merely to save the constitutionality of registration of land. But, in my opinion, there is an opportunity and a great opportunity, and much need for a



CHARLES THORNTON DAVIS
Associate Judge 1898-1909. Judge 1909-1936

tribunal that can give specialized knowledge and specialized facilities and immediate, speedy hearing and determination of questions relating to the title to land that will be binding upon the world."

Two judges and a recorder were appointed. There has always been in the profession a certain amount of uninformed condescension toward conveyancing in general, going back to the time when Lord Chancellor Hardwicke rebuked Sir Robert Henley, later Lord Chancellor Northington (a good lawyer and a genial three-bottle man) for contemptuous remarks about the practice of conveyancers, which Hardwicke regarded as most helpful as a source of law. In spite of its absurdity, this attitude, even among conveyancers, extended to the new court in its infancy and adolescence. Gradually, however, the profession began to realize the importance of the court

which was created for the purpose of making a "good" title "marketable"; and this was due very largely to the ability and personality of one man, just as the act creating the Court was due largely to one man. Davis served for thirty-eight years. His senior colleague was elderly and not well. It is common knowledge among the "elder brethren" of the bar that the real development of the court, and its gradual establishment and growth in the confidence of the community, was the work of Judge Davis with the able assistance from the beginning of Judge Smith, the first recorder and later a judge, and, for more than twenty-five years, of Judge Corbett. For its first twenty-five years these three men were "The Land Court" and, great as were the services of Judge Corbett and Judge Smith, Judge Davis was the spearhead in the advance of the court in public estimation.

JUDGE DAVIS'S LAST MESSAGE TO THE BAR

Even this brief account of the Land Court should include Judge Davis's last message to the bar at the close of his address about a month before his death, already referred to.

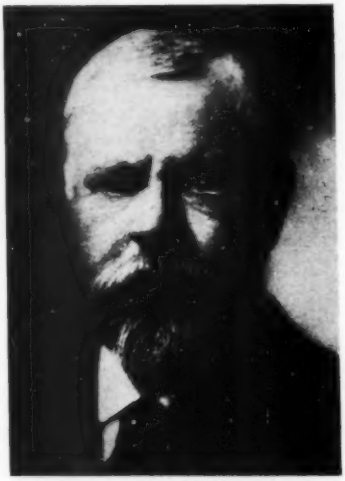
The constitutionality of the Court's proceedings was challenged, shortly after its creation, in *Tyler* v. *The Judges*, 175 *Mass.* 71, and was sustained in an interesting opinion by Chief Justice Holmes in 1899 when Judge Davis had been on the Bench for about a year. Judge Davis, referring to the "great opportunity", suggested by Hemenway, said:

> "Well, that depended entirely on the Bar and I undertook to do it. The point I want to make is this: It isn't the judge and it isn't our very remarkable engineer. What has made the Land Court here in Massachusetts is the Bar as it has grown and developed and changed its character, until now the Court has jurisdiction both of law and equity over any matter which directly involves the title to land. It has been in response to the demands of the Bar that use it and the real estate owners who wish to take advantage of it.
>
> "The reason that it has been a success, I think, is this: this is probably the last time I shall ever make a public address and I should like to pass this on. When the case of Tyler against the Judges came to be heard in Washington, I was taken over, it being considered proper by the Attorney-General, Hosea M. Knowlton, that the Court itself should be there and also because he wanted my help in brief making and one thing and another, in connection with his then young assistant, later Mr. Justice Franklin T. Hammond of our Superior Court. So I went over there.
>
> "My relations with him were personal and peculiar. While at the bar, I had been doing the work for the Attorney-General in regard to real estate titles through his office for some time. He was a great lawyer, a powerful, dominating personality, square shouldered, straightforward, direct, and most impressive, a great stickler for etiquette. When he wanted to see me he

would have that intimated from the State House. I went up and was received by the doorkeeper. The door opened.

"'Mr. Attorney-General, Judge Davis.'

"'Ah, yes, yes, come in, come in. Sit down, Your Honor. Close the door, Robinson. Now, boy, what is this Court of yours trying to do now?'"



HOSEA M. KNOWLTON
Attorney General
1894-1902

"Well, he took me to Washington. He had a raucous whisper that could be heard all over the courtroom. In the midst of the argument of that case, Mr. Justice White turned around and said, 'Mr. Attorney-General, what is there in this law to prevent free and unbridled collusion between the Court and the lawyers and petitioners?'

"The old Attorney-General settled himself back and said, 'Absolutely nothing, Your Honor, except the traditional character of the Bench and Bar of Massachusetts.'

"There was a pause and all of the other judges turned and bowed to Mr. Horace Gray. Judge Gray bowed back again and then, in a tense whisper that could be heard all over that courtroom, the Attorney-General turned to me and said, 'By God, boy, you remember that.'

"I want to say, so far as the Land Court is concerned, the Bar has remembered that.

We have referred to the dramatic aspect of the growth of a new court. The closing scene of the Land Court controversy in the

Supreme Court of the United States 179 U. S. 405, as described by Judge Davis, was a striking climax to the drama.

Judge Davis, Judge Smith and Judge Corbett with vision and practical sense demonstrated the meaning of "the great opportunity" which Alfred Hemenway predicted. They "set the pace" and their successors—Judge Fenton and his associates have "carried on."

JOHN E. FENTON
Judge of the Land Court—1937-

(John Adams, Continued from Page 100)

venture to call attention to certain aspects of men selected by Adams, as a part of the appreciation of what we owe to him.

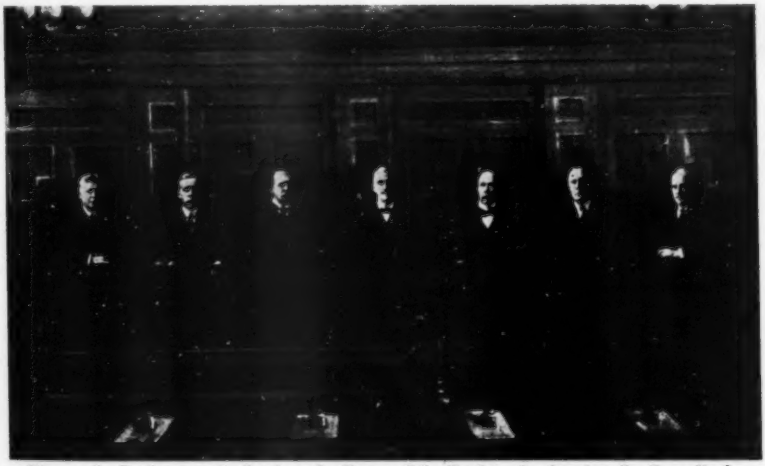
We hear much of the early military career of an occasional judge and less of others, like the late Mr. Justice Sheldon, but the rarest of them all seems to have been John Marshall. As an indication of his character it is well for us to remember the description, in Beveridge's first volume, of Marshall as the most cheerful man in the army at Valley Forge. The cheerfulness of Mark Tapley, in Dickens' "Martin Chuzzlewit" may be annoying to some readers, but the picture of Marshall keeping up the spirit of Washington's soldiers during their sufferings in the winter at Valley Forge, can hardly annoy the most captious critic. It deserves a prominent place among the bright spots of American history. We can all learn something by studying the Jarvis portrait which appears as the Frontispiece to volume II of Beveridge's "Life of Marshall."

(Continued on Page 119)

THE PROBATE COURTS

ARTHUR W. DOLAN
Justice Supreme Judicial Court
1937-1949

Each of the 14 counties in the Commonwealth has a probate court with jurisdiction of estates, trusts, divorce, adoption and other domestic relations. Judge Dolan was a distinguished representative of the Probate bench who after many years of such service was appointed to the Supreme Judicial Court and served with distinction for twelve years.

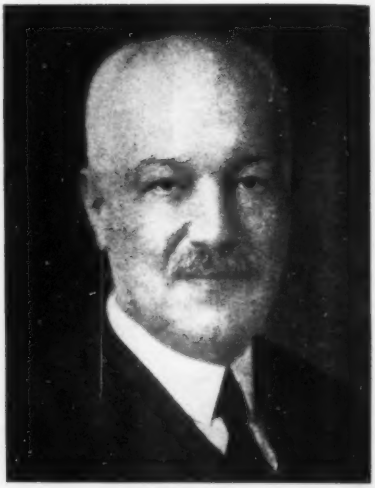


Pierce, J., DeCourcy, J., Loring, J., Rugg, C.J., Braley, J., Crosby, J., Carroll, J.
SUPREME JUDICIAL COURT
1915-1919

THE DISTRICT COURTS

We are coming to realize that the lower tribunals, commonly referred to as "inferior" courts, are "inferior" only in a technical sense, and that, in their actual influence and position, they represent the administration of justice to more people than any other tribunals. The reason is that they come in direct contact with, and are watched closely by, more members of the public as parties, or witnesses, whose respect for law and confidence in the courts is essential to the peace of the community.

WILFRED BOLSTER
Chief Justice, Municipal Court of the City of Boston, 1906-1939



CHARLES LOVEJOY HIBBARD
Justice, District Court of Central Berkshire, 1913-1947

WILFRED BOLSTER

It has been said too often, even if sometimes true, that, under our appointive system of judicial selection, "a judge is just a man who knew the governor." That is not the explanation of the deserved reputation of the Massachusetts judiciary during the 173 years since the adoption of the Massachusetts Constitution in 1780. Neither is the explanation to be found in the judicial salaries which have been minor factors in our judicial history. The explanation is in the wisdom of the governors who selected the long line of able men of character and ability for judicial service and in the service rendered by them which has been the result of native ability coupled with adequate knowledge and a strong sense of professional responsibility, regardless of pecuniary reward. Among these judges on our various courts in the past, it has fallen to the lot of a few

already mentioned, to be leaders in the "breaking in" of new courts, or in making new starts in the administration of old courts. Wilfred Bolster, appointed by Governor Crane, as a special justice in 1902, and, by Governor Guild, chief justice in 1906, was eminently qualified for a position on our highest courts but declining appointment to the Superior Court, he continued as chief justice because he felt that he could render there a much needed public service. He realized that the district courts, and the Boston Municipal Court, as the largest of them, represented the administration of justice to many people who never appear in any other courts. He believed, as Chief Justice Parsons believed, that if the judicial department was to be regarded with respect by the people "the first and most essential cause must be," that it "should deserve to be so regarded." He set himself to that task and, for 33 years as chief justice, until his retirement in 1939, he set standards of judicial administration. In addition he served as a most helpful and active member of the Judicial Council for sixteen years from 1930 until a few months before his death at the age of 80, on May 3, 1947.

The public and the legal profession are indebted to him as one of the outstanding constructive figures in our legal history.

CHARLES L. HIBBARD

The bar and the community little realize the quiet, painstaking and continuously effective public service rendered by the members of the Administrative Committee of the District Courts and their chairmen since its creation in 1922, as an advisory body for the 72 courts outside of the central Boston Municipal Court. And the mainspring of the work from 1922 to 1947, first as secretary and, in the later years, as chairman, was Charles L. Hibbard of Pittsfield. Punctilious in his attention to the daily engagements in his own court, careful in handling a mass of details and always apparently serene under pressure, he helped to bring a chaotic collection of 72 isolated scattered courts into something resembling a system with greater uniformity of practice so that they would, in the words of Chief Justice Parsons, "deserve" to be trusted with the increased jurisdiction which they now have. For many years he also served actively as a member of the Judicial Council, traveling across the Commonwealth to attend its meetings. His successor as Chairman of the Administrative Committee—Hon. Frank L. Riley of Worcester and his associates of the District bench—Judges Leary, Nash, Hobson and Eno carry on.

JUVENILE COURTS

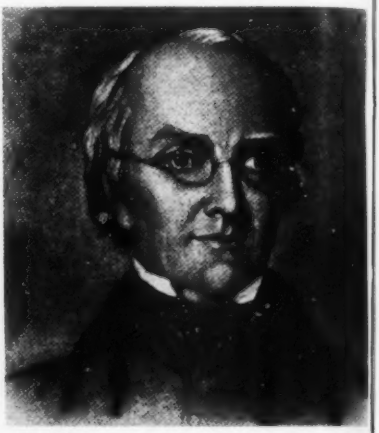
The reason for juvenile jurisdiction was stated in one sentence by Sir John Fielding. (the blind police Magistrate of the Bow St. Police Court in London) in the 18th Century. He said putting boys

(Continued on Page 122)

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES APPOINTED FROM MASSACHUSETTS

WILLIAM CUSHING
1789-1811

His picture apears as Chief Justice of the Revolutionary Court and of the Supreme Judicial Court from 1775 to 1789. He was appointed Chief Justice by President Washington in 1796, but declined the appointment.



JOSEPH STORY
Justice Supreme Court of the United States 1811-1845

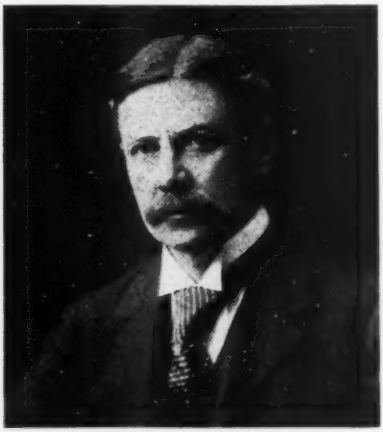
(For the "Place of Judge Story in the Making of American Law" see Roscoe Pound's paper before the Cambridge Historical Society, reprinted in 1 Mass. Law Quarterly No. 3, May, 1916.)

HORACE GRAY
1882-1902

BENJAMIN R. CURTIS
1851-1858

OLIVER WENDELL HOLMES, JR.
1902-1932

Their pictures have appeared herein.



WILLIAM H. MOODY
Justice of the United States Supreme Court
1906-1910

LOUIS D. BRANDEIS
Justice Supreme Court of the United State
1916-1939

FELIX FRANKFURTER
Justice Supreme Court of the United States
1939—

John Adams, Continued from Page (114)

As to Washington, we simply emphasize his service as Chairman of the Philadelphia Convention of 1787, which drafted the Federal Constitution—the culminating and, for that reason, possibly, the greatest of his *revolutionary* services, although not commonly so regarded. The nature of this service is described at some length in 28 Mass. Law Quarterly, No. 4, December, 1943, in an address on "What He Should Mean to Us To-Day."

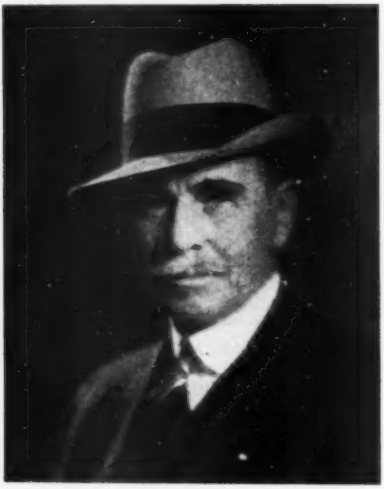
ADAMS AS THE ONLY UNPARDONABLE AMERICAN IN 1776

Carl Van Doren in his "Benjamin Franklin" described the conferences with Lord Howe, requested by him on Staten Island in 1776 and made the following statements.

> "As a more pacific venture the two Howes had been named as special commissioners to offer full pardon to all rebels, with the secret exception of John Adams. It was soon believed in America, however, that Samuel Adams, Richard Henry Lee, and Franklin also were excepted." Pp. 552-3.
>
> "Franklin, John Adams (not aware that the Privy Council had excluded him from pardon), and Edward Rutledge of South Carolina were chosen on 6 September to go on the questioning errand." P. 558.

If Adams was the only and "secret" exception, his outstanding position and powerful influence was obviously recognized by the English government at that time.

THE FATHER OF THE MASSACHUSETTS LAW QUARTERLY



JOHN H. WIGMORE

In June 1915 Dean Wigmore published a note in the Illinois Law Review on the need of state law reviews to stimulate local professional thought and provide a medium through which the bar might help to perform its critical and suggestive function of sharing in the development of local law, as most general law reviews reached relatively few lawyers in any one state. Hon. Henry N. Sheldon, then recently retired from the Supreme Judicial Court, was president of the Massachusetts Bar Association and under his supervision, and that of Hon. John W. Hammond and George R. Nutter (later president) as his colleagues on the publication committee, the Massachusetts Law Quarterly was started in December 1915. Its purpose, which has been maintained, was to deal primarily with Massachusetts law and legal history in its practical bearing on current and continuing problems of law and practice, judicial organization and constitutional government both local and federal. All the county law libraries have a set as it has been sent to them without charge since the beginning.

The "Quarterly" contains the story of almost all the legal developments in Massachusetts since the beginning of the century,

and much statutory and constitutional history (possibly bearing on interests of their clients) which can be found nowhere else. They may find, also, the answer to the questions, sometimes asked, "What does the State Bar Association do? Why should I join it? What is there in it for me?" The only *short* answer to those questions is that Massachusetts lawyers today are serving their clients and earning their living under more convenient modern professional conditions which have been gradually brought about by the Massachusetts Bar Association, not, of course, alone, but in cooperation with others, and, frequently, as an initiating and suggestive body.

During the past thirty-eight years the bench and bar have been more fully informed of what was going on in their profession than ever before—at least since the passing of the "Law Reporter" about 1866. And this information has been followed by practical results in legislation and practice, although many lawyers are unconscious of the story. A consolidated index to the 38 volumes is in preparation.

The Massachusetts Law Quarterly was, we believe, the first to follow Dean Wigmore's suggestion.* Almost every state now has a law review of some kind.

CONCLUSION

Such is the outline of Massachusetts legal history. The following pages under the heading "Lest we Forget" (p. 124) contain a little history not limited to Massachusetts.

We are not among those who may believe that all Massachusetts geese are swans. We have simply tried to picture to you, as living forces, some of the men, and there have been many more, who helped in forgotten ways, in thinking out the foundations of the government under which we live today, not as a government of abstract theories, but of applied law—of the common law of America. They knew, as we know, that "what is everybody's business is nobody's business," and that constructive thinking by individuals is necessary before collective thought is possible. They faced the facts of greatness and littleness in human nature at close range and helped to bring out the greatness of the American people. The littleness, of course, is always with us. It is the function and the privilege of members of our profession, now as it was then, to think as hard, as high, as broadly and, at the same time, as close to human nature as they did, in the interest of the public and "prosterity". We call attention to the "Epilogue" in the latest "Survey" book "The Lawyer from Antiquity to Modern Times" by Dean Pound (pp. 353-362).

F.W.G.

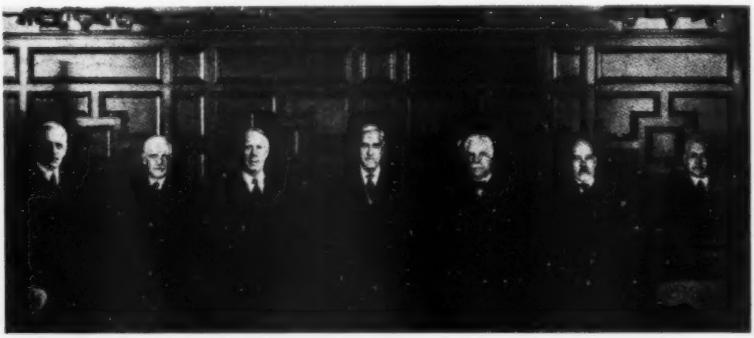
---

* See American Judicature Society Journal, February, 1939,229.

AN ANCESTOR OF THE SUPREME JUDICIAL COURT

By the act of 1699 the court was given all the jurisdiction of 'the Courts of King's Bench, Common Pleas and Exchequer". The Kings Bench in 1454, appears opposite this page. A similar picture of the Common Pleas appears as the frontispiece of "The Order of the Coif," by Serjeant. Rulling.

In the picture, here reproduced, the coiffed judges sit the King's Coroner and Attorney and the Masters of the Court, placed just as one would have seen them for the next four hundred years and more until the reorganization of the Courts. At either end of the bar is a sergeant. It has been stated that there is internal evidence that the original was made in the scriptorium of the Abbey of Saint Edmundsbury in Suffolk.



Sanderson, J.; Carroll, J.; Rugg, C. J.; Pierce, J.; Wait, J.; Field, J.

THE SUPREME JUDICIAL COURT 1929-1932

Juvenile Courts Continued from Page (117)

in jail is more likely to make their morals worse than better* and he helped to found three institutions as alternatives. Such ideas grow slowly and it was more than 100 years later that the Boston Juvenile Court was established in 1906 as a pioneer court and juvenile jurisdiction extended also to the 72 District Courts outside of the Central District of Boston.

* See "The Legal Careers of Henry and Sir John Fielding" in A.B.A. Journal about 10 years or so ago.

THE COURT OF KING'S BENCH IN 1454

John Markham, Richard Bingham — JJ
Sir J. Fortesque — C. J.
William Yelverton, Ralph Pole — JJ

(From the Selby-Lowndes Illumination in the Inner Temple)

LEST WE FORGET

A DILEMMA OF THE LEGAL PROFESSION

As a result of reading a good deal of legal history and biography, collecting legal caricatures of the 19th century on both sides of the Atlantic and conversation and observation over many years, we have been impressed by the fact that the members of the profession on and off the bench are constantly faced with the dilemma of taking themselves too seriously on the one hand or not seriously enough on the other. We make no apology, even on this commemorative occasion, for calling attention to some of the historic, but less complimentary views of the profession to bring out, by contrast, the real significance of the organization which we commemorate.

THE "FACTS OF LIFE" FACED BY THE BAR IN AN IMPERFECT WORLD

Sir Walter Scott, who was himself a lawyer, put into the mouth of Mr. Pleydell, the old lawyer in "Guy Mannering" the much quoted words:—

> "In civilized society law is the chimney through which all that smoke discharges itself that used to circulate through the whole house, and put every one's eyes out—no wonder, therefore that the vent itself should sometimes get a little sooty." ("Guy Mannering," Chapter 39).
>
> "A lawyer without history or literature," said Mr. Pleydell, "is a mechanic, a mere working mason; if he possess some knowledge of these, he may venture to call himself an architect." (Chapter 37)

The founders of the Bar Associations were "architects" in a very real sense but, their conception of what we know today as "public relations" was practically non-existent. Even today we know too little about it, and it might have been wiser if they had quoted, as part of a preface to the constitution, or, perhaps, as a preface to the "Canons of Ethics" under the heading "Lest we Forget" the stanza of Robert Burns poem "To a Louse—On Seeing One on a Lady's Bonnet in Church"—

> "O wad some power the giftie gie us
> To see oursels as others see us!
> It wad frae monie a blunder free us
> An' foolish notion:"*

Jack Cade's desire to "kill all the lawyers" has been quoted to the bar *ad nauseam*, and a little variety in the reminders of historic abuse of the profession is more interesting.

Dean Swift described the legal profession in his caustic manner in the fourth part of "Gulliver's Travels" in 1726.

Comments on the bar have not been confined to writing. Gilray, Rowlandson, Doyle, Cruikshank and other caricaturists during the past one hundred and fifty years have frequently expressed their views in pictorial form.

The profession in New York was lashed by the pencil of Nast

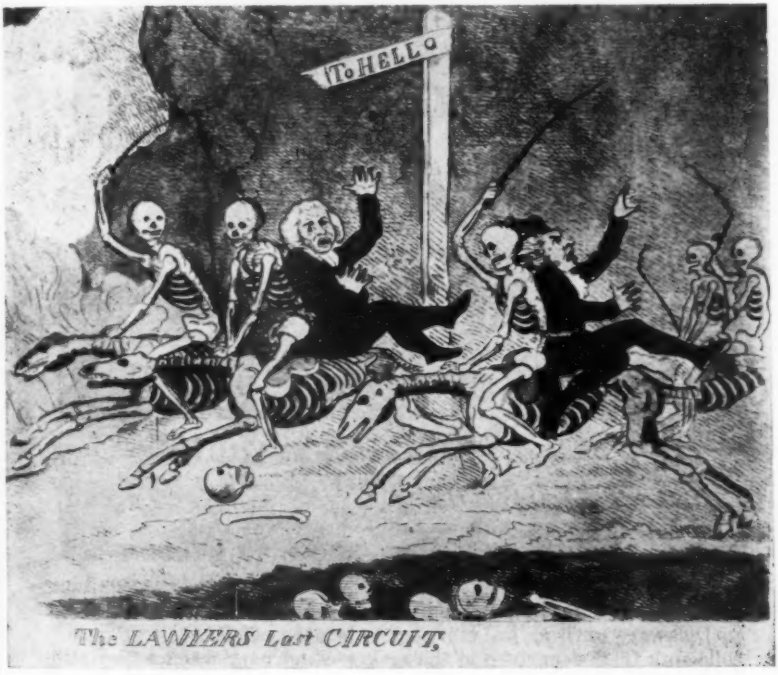
* We notice that these lines are quoted in the opening sentence of the very recent "Survey" book by Judge Phillips and Judge McCoy on the "Conduct of Judges and Lawyers".

during the reign of Boss Tweed, which led to the organization of the Bar Association of the City of New York. (See Paine's "Thomas Nast, His Period and His Pictures."

Coming down to the present time, Mr. Will Shafroth opened an article a few years ago with the following passage:

"The general opinion of the legal profession held by laymen is not flattering to the lawyers. Carl Sandburg has put it into poetry in the following words:

'The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer holds a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers—tell me why a hearse horse snickers
hauling a lawyer's bones.' "



The LAWYERS Last CIRCUIT.

(From an Old Print)

JOHN DOE AND RICHARD ROE—THEIR PORTRAITS, THEIR HISTORY, THEIR SERVICES IN THE ADVANCEMENT OF JUSTICE AND THEIR LEGACY TO THE PROFESSION

"Thrice honour'd be that Lawyer's Shade
Who Truth with Nonsense first combin'd,
And Equity with Fiction join'd."

(From "The Pleader's Guide")

In 1935 Mr. Mitchell Dawson, Editor of the Chicago Bar Record, published an account of these heroes, described by Hon. Elliot Anthony, in 1884, as "representatives of sturdy manhood and good government—immortal as the intellectual principle from which they derived their origin." This led us to further inquires.

Messrs. Doe and Roe, together with some of their contemporary associates in fiction are worthy of serious study in connection with

JOHN DOE and RICHARD ROE
BROTHERS IN LAW."

current problems of judicial administration. Practically ubiquitous in common law jurisdictions for almost two centuries, they survived in Delaware until a few years ago when we officiated at a "wake" following their departure to the realms of memory whence they still radiate suggestion through the pages of Sir Frederick Pollock and the dusty unread third volume of Burrows Reports containing one of Lord Mansfield's opinions.

The year 1796 produced not only two portraits, one of which is here reproduced, but "the Pleader's Guide"—"A Didactic Poem" by John Anstey, in which their virtues are extrolled. Ma. Dawson said:

"They were undoubtedly the offspring of Our Lady of the Common Law; and their paternity has often been attributed to Henry Rolle, Lord Chief Justice of England during the Interregnum and author of the *Abridgment,* who is said to have invented the machinery by which the action of ejectment was converted from a suit for damages to a device for trying questions of title.

"One of the principal roles of John Doe was to act as fictitious lessee in ejectment suits, and Richard Roe was a sort of stooge, known to the law as a "casual ejector." They put on their little skit literally thousands of times, often playing in a number of courts simultaneously. They were not without competition, however, for several other gentlemen, whom we find mentioned in the law reports by such names as Fairclaim, Goodright, Shamtitle, Goodman, Wrong and Frogmorton, lent themselves as parties to ejectment suits.

"The survival of Doe and Roe may perhaps be due to the shortness and rhyming quality of their names; they . . . adventured into other fields of law offering themselves as pledges or bail in all manner of actions. Jeremy Bentham considered their activities in this respect as contemptible and called the use of their names as straw bail a "vile lie." But this seems rather harsh, for their conduct was in accordance with the legal practice and ethics of the times".

A TRIBUTE BY SIR FREDERICK POLLOCK

("The Genius of the Common Law" pp. 70-72)

"By fiction the cumbrous real actions were all but laid on the shelf, and those two good stage carpenters, John Doe and Richard Roe, set a scene which they left clear for the speaking actors to play their parts without further hindrance" . . . It is easy to laugh at these and other fictions that our fathers made in their need. Their outer garb may be quaint, even grotesque; but in every case there was a sound principle of justice under these trappings, and the ends of justice could not be otherwise attained. . . .

"Uniformity of Process Act, Common Law Procedure Acts, Judicature Acts, these in our fathers' time and our own took down the queer untidy scaffolding of procedural devices; but without the scaffolding the builders could not have worked."

THE TRIBUTE OF "JOHN SURREBUTTOR" (John Anstey)

From the "Pleader's Guide." Book I, Lect. VIII, p. 67. (1796)

"Then let us pray for writ of PONE*
JOHN DOE and RICHARD ROE his Crony,
Good men, and true, who never fail
The needy and distress'd to bail,
Direct unseen the dire dispute
And pledge their names in ev'ry suit. . . .
Sure 'tis not all a vain delusion,

* *"Pone* — The Pone is the Writ of Attachment before mentioned, it is so called from the words of the Writ, *pone per vadium & salvos plegios, 'Put by Gage and safe Pledges, A.B.'* John Doe and Richard Roe."

Witness ye visionary pair,
Ye floating forms that light as air,
Dwell in some SPECIAL PLEADER'S brain;
Methinks I see the Ghosts rejoice
Of Lawyers erst in Fiction bold
LEVINZ and LUTWYCHE, Pleaders old,
With Writs and Entries round him spread,
See plodding SAUNDERS rears his head,
Lo! VENTRIS wakes! before mine eyes
BROWN, LILLY, and BOHUN arise,
Each in his Parchment shroud appears,
Some with their Quills behind their ears,
Flourish their velvet Caps on high,
Some wave their grizzel wigs, and cry
Hail happy Pair! the Glory, and the Boast,
The Strength and Bulwark of the legal Host,
Like **SAUL and JONATHAN in Friendship tried,
Pleasant ye liv'd, and undivided died!

* * * *

While Writs shall last, and Usury shall thrive,
Your name, your honor, and your praise shall live:
Jailers shall smile, and with Bumbailiffs raise
Their iron voices to record your Praise,
Whom Law united, nor the Grave can sever,
'All hail JOHN DOE and RICHARD ROE for ever.' "

** "*Saul* — 'Saul and Jonathan were pleasant in their Lives, and in their Death they were not divided.' — *2d Samuel, c.* 1, *v.* 23."

A EULOGY BY HON. ELLIOT ANTHONY

"It is commonly supposed that the law affords but little scope for the imagination . . . but . . . John Doe and Richard Roe were the precursors of a most important era in English history and English law, and their appearance marks the boundary line of barbarism and modern civilization. They stand for reform; for a change in the treatment of litigants and especially the treatment of defendants, who were quick to take advantage of the first relaxation of the ancient law, and the simple changes in the ancient forms and methods were followed up by a revolution that emancipated many helpless debtors from the cruelties and oppressions of sheriffs and their deputies, who at one time held the keys almost of life and death." 17 *Chicago Legal News* 111, (1884).

LORD MANSFIELD IN ACTION ON THE BENCH AS A LEADER IN THE ADMINISTRATION OF JUSTICE.

"The proof of the pudding is in the eating" and the actual progress made by the courts with the assistance of Messrs. Doe and Roe, and their less known contempararies, in the face of the habitual inertia of the profession and the community appears in the case of *Fair-claim, ex dismiss' Fowler et al.* versus *Sham-title,* in Ejectment (3 Burrow's 1290, 1292-1296):

"LORD MANSFIELD—in ejectments, the court can never want jurisdiction to prevent the plaintiff from recovering without a proper trial. An ejectment is the creature of Westminster-Hall

introduced within time of memory; and moulded gradually into a course of practice, by rules of the courts. The same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience happens to shew inconveniences or defects. . . .

"An ejectment is an ingenious fiction, for the trial of titles to the possession of land.

"In form, it is a trick between two, to dispossess a third by a sham suit and judgment.

"The artifice would be criminal, unless the court converted it into a fair trial with the proper party."

THEIR LEGACY TO THE PROFESSION

John C. Gray, in his "Nature and Sources of Law," quoted Professor Dicey:

"'Jurisprudence is a word which stinks in the nostrils of the practising barrister.' . . . Yet as Mr. Dicey goes on to show, 'Prejudice, excited by a name which has been monopolized by pedants or imposters,' should not blind us to the advantages of having clear and not misty ideas on legal subjects."

The word "reform" is also apt to produce a similar reaction in the minds of many busy practising lawyers, who prefer to "stick to the devil they know." The phrase "change to meet the needs of the public and the litigants whose interests are involved, and who pay the bills" is less objectionable, because the profession is expected to study those needs as a condition of public confidence which the lawyers need very much in these difficult times.

"*Now*, least of all, need we make apology for saluting the Benthams and the Broughams who have appeared in each generation, and on both sides of the Atlantic." (Professor Freund in *Har. Law Rev.* for December, 1940, p. 366.)

"Court procedure seems to us peculiarly one for local experiment in convenience and effectiveness."

(3rd Report Mass. Judicial Council 65-66; cf. Sunderlund, Har. Law Rev., April 1926, 744-5.)

"Every detail . . . in the administration of justice affects, in some way or other, the lives of more individuals than is generally realized." (16th Report of Mass. Judicial Council, 1940.)

With these modern quotations in mind, if you listen attentively, you can hear John Doe, and Richard Roe with their centuries of experience of the ossified formalism of earlier years, and as forgiving disciples of their arch critic—Jeremy Bentham, dictating their legacy as follows:—

"In memory of our foster father, Chief Justice Rolle while at the bar and Lord Chief Justice Mansfield on the bench, we leave to all judges, practising lawyers and legislators our "freedom from fear" of reasonable experiments in procedure for the administration of justice because having been, ourselves, successful experiments by indirection when we were needed until we were retired by better experiments, we believe you to be capable of advance by the use of imagination and judgment."

A GENIAL PICTURE OF TWO GREAT JUDGES

The Influence of Port on Legal History

T. Noon Talfourd, Serjeant-at-law, member of Parliament, a judge of the Court of Common Pleas, and essayist, was one of the literary lawyers of the early 19th century.

A friend of Dickens, he revised the trial scene in *Bardell* v. *Pickwick* and pleaded with Dickens for a more lenient fate of the Artful Dodger in "Oliver Twist", but without success (although he did succeed in the case of Charlie Bates).*

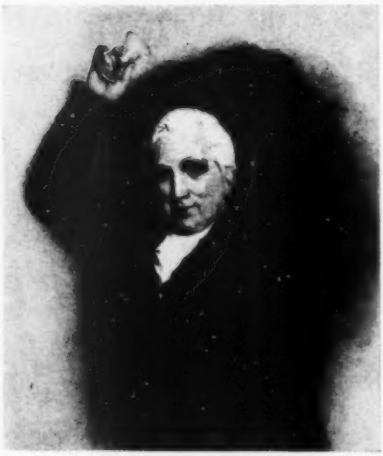
His essay on Lord Eldon and Lord Stowell presents a genial sidelight on legal history which is worthy of rescue from forgotten pages in these days.

John and William Scott, the two sons of a coal-fitter of Newcastle, rose to the head of the legal profession: John, as Lord Eldon the Chancellor for many years, William, as Lord Stowell, the great admiralty judge of the Napoleonic Wars. Serjeant Talfourd says of them:

> "If, however, these great lawyers were not prodigal of extensive entertainments, they loved good cheer themselves, and delighted to believe that it was enjoyed by others. We well remember, more than thirty years ago, the benignant smile which Sir William Scott would cast on the students rising in the dim light of their glorious hall [the Middle Temple, now more or less bombed], as he passed out from the dinner table to his wine in the parliament chamber; his faded dress and tattered silk gown set off by his innate air of elegance; and his fine pale features beaming with a serene satisfaction which bumpers might heighten but could not disturb. He and Lord Eldon perfectly agreed in one great taste—if a noble thirst should be called by so finical a name—an attachment to port wine, strong, almost as that to constitution and crown; and, indeed, a modification of the same sentiment. Sir William Scott may possibly in his lighter moods have dallied with the innocence of claret—or, in excess of the gallantry for which he was famed, have crowned a compliment to a fair listener with a glass of champagne—but, in his sedater hours, he stood fast by the port, which was the daily refreshment of Lord Eldon for a large segment of a century. It is, indeed, the proper beverage of a great lawyer—that by the strength of which Blackstone wrote his Commentaries—and Sir William Grant meditated his judgments—and Lord Eldon repaired the ravages of study, and withstood the shocks of party and of time. This sustaining tranquilizing power is the true cement of various labours, and prompter of great thoughts. Port only can harmonize with the noble simplicity of ancient law, or assuage the fervour of a great intellectual triumph."

---

* See "Dickens as a Criminologist", *Journal of Criminal Law and Criminology*, July-August 1938, 170.



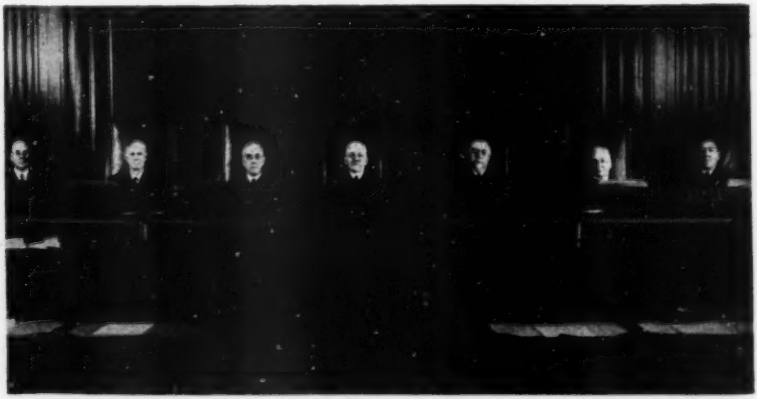
"One Cheer More!"

JOHN SCOTT, EARL OF ELDON
LORD CHANCELLOR, 1801-1806, 1807-1827
From an old print in the Harvard Law School which appears as the frontispiece to Professor Chafee's Case Book on "Equitable Remedies."

"Equity, when Lord Eldon retired, was no longer a system corrective of the common law; it could only be described as that part of remedial justice which is administered in chancery, while taken generally, its work was administrative and protective, in contrast with that of the common law, which was remedial and retributive."

His sense of justice is illustrated by his dictum, after eloping, that "the only reparation which one man can make to another for running away with his daughter is to be exemplary in his conduct to her."*

* Holdsworth, "Some Makers of English Law," Cambridge University Press (1938), pp. 191 and 200, and Chapter IX.



Cox, J.; Qua, J.; C. H. Donahue, J.; Field, C.J.; Lummus, J.; Dolan, J.; Ronan, J.
The Supreme Judicial Court in 1942

For "Epilogue" see p. 132.

EPILOGUE

This story has been put together partly in response to an insistent demand from our friend, Arthur Vanderbilt, for a history of Massachusetts law and courts. While sharing his sustained professional enthusiasm we are not equipped with his amazing combination of dynamic energy and strength to do, simultaneously, or in succession, almost everything in the profession off and on the bench, and do it well, including the writing of books. Accordingly, in order to justify our professional existence, our function has, perforce, been limited, largely, to that of a suggester in discussions less extended and less laborious than books. As we have often found pictures and cartoons more illuminating than much writing, we hope that this collection may be found stimulating by some vigorous younger enthusiast with a taste for reading who can produce a more connected story by filling in the details, and balancing them, with the "literary art" and judgment for writing readable legal history of which Prof. Morison speaks in the Old South Leaflet*, quoted in our "Foreword."

Having been born and bred in Massachusetts, perhaps, in closing on behalf of the organized bar of Massachusetts, but of course, with all "true humility" in its best sense as described by Tennyson in "The Holy Grail",** we should borrow from the chorus of a 19th century song spuriously attributed to an idealistic organization of that era, the lines:—

"Of course you can never be like us
But be as like us as you're able to be"

F. W. G.

---

* For the information of our visitors we call attention to the fact that many historical leaflets may be obtained for ten cents each at the Old South Meeting House.

** "True humility, the highest virtue, mother of them all."

Incidentally, this line from Tennyson reminds us that we have found it balancing to read, occasionally, Edward Rowland Sill's poem "The Fool's Prayer". We recommend it to all members of the legal profession and, especially to those in positions of power.

WAKE

AUTOPSY

X

Massachusetts Equity Pleading and Practice with Forms

By

LEO A. REED

Table of Contents

Published and sold by

BOSTON LAW BOOK CO.

8 Pemberton Square **LAfayette 3-6882**